

Lack of Consent as the Constituent Element of Rape

An analysis of the International Obligations of Norway and how they affect the definition of Rape in the General Civil Penal Code of 1902

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Abstract

The incorporation of the European Convention on Human Rights (ECHR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) into the Human Rights Act, and transformation of the Rome Statute into the Norwegian Penal Code of 2005(NPC) has actualized the impact of international tendencies in regard of positive obligations under the Conventions to penalise any non-consensual activity as rape. Failure to comply with these international obligations provides different outcomes for the Member State Parties. At the present, the current definition of rape in Section 192 of the General Civil Penal Code of 1902 (GCPC) is in conflict with the international obligations of Norway, as it does not penalise non-consensual sexual activity as rape. The ECtHR stated in *M.C v. Bulgaria* that the Member State Parties have a positive obligation to penalise any non-consensual sexual act cf. Articles 3 and 8 of the ECHR. Failure to comply with this obligation may give rise to damage liability for the State of Norway towards individuals subject to non-consensual sexual activity. The Committee of CEDAW urged Norway in its Eight Periodic Report of Norway to: “Adopt a legal definition of rape in the Penal Code so as to place the lack of consent at its centre, in line with the Committee’s general recommendation No. 19, and the Vertido case.” In the light of relevant domestic statutory law and case law, this recommendation can be interpreted as a specific provision under CEDAW and thus a positive obligation for Norway to undertake. Failure to comply with this obligation might contribute to continued discrimination of women in law and practice. The Rome Statute was transformed into the Norwegian Penal Code (NPC) of 2005 chapter 16 penalising rape as war crimes and crimes against humanity. Rape is not specifically defined, but the preparatory works held that the specified provisions were to be interpreted in the light of, and in accordance with the international obligation. The definition of rape as a war crime and as a crime against humanity is at the present unresolved. There are currently pending cases before the International Criminal Court expected to bring clarity as to how rape is defined in the light of the Rome Statute. During the late 1990’s and beginning of the 21st century, three definitions of rape were issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Current trends of international law seem to favour the non-consensual definition of rape held by the ICTY in the *Kunarac case*. The object and purpose of transforming the Rome Statute into chapter 16 of the NPC was to prosecute war

crimes and crimes against humanity under Norwegian jurisdiction. Failure to revise or expand the definition of rape in the GCPC might prevent Norwegian Courts from convicting people accused of crimes against humanity and war crimes, contrary to the object and purpose of chapter 16 of the NPC. The situation with two different definitions of rape in Norwegian Criminal Statutes may be considered unsatisfactory. Even if there were no conceptual or systemic arguments decisively against maintaining this dual system, the International criminal solution may provide additional policy arguments in favour of redefining rape in the domestic Penal Code. The Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) confirms the international trend towards regarding lack of consent as the constituent element of rape. Case law, and reports from the ECtHR, Committee of CEDAW, ICTY, ICTR and ICC shows that these supranational organs refer to one another in deciding the common denominator of rape. The Constitution of Norway and the Supreme Court's strict practice of the principle of legality limit the scope of the immediate affect of International Obligations in the realm of criminal law, in favour of the accused. Fulfilment of the International Obligations of Norway is thus based on the consensus of the State.

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1 Introduction

1.1 The Subject Matter of the Thesis

The subject matter of this Master Thesis is Lack of Consent as the Constituent Element of Rape. An analysis of the International Obligations of Norway and how they affect the Definition of Rape in the General Civil Penal Code of 1902.

The current definition of rape in Section 192 litra a and b of the General Civil Penal Code (GCPC) have four alternative elements that together with sexual activity is defined as rape. Any person can be held liable for rape if that person “engages in sexual activity by means of violence or threats” cf. Section 192 litra a, or “engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act” cf. Section 192 litra b.¹

The Committee on the Elimination of Discrimination against Women criticized this definition of rape in their eight periodic report of Norway on 16 February 2012.² The Committee urged Norway to “adopt a legal definition of rape in the Penal Code so as to place the lack of consent at its centre, in line with the Committee’s general recommendation No. 19, and the Vertido case”.³ The Committee’s report gave the author a notion to look into the International Obligations of Norway concerning rape, in order to see how they define rape, and to analyse if, and in case, how they can affect the definition of rape in Section 192 of the GCPC.

Norway does not have a lack of consent-based definition of rape at the present. As a consequence of the UN Committee’s Eight Periodic Report of Norway, and the signature of the

¹ GCPC 1902 p. 76

² CEDAW/C/NOR/8 p. 5-6

³ CEDAW/C/NOR/8 p. 6

Istanbul Convention on 7 July 2011, the Norwegian Ministry of Justice and Public Security proposed to expand the definition of rape in Section 192 of the GCPC into another letter, *litra d*, adding “lack of consent” to the sexual activity as rape. The official hearing finished on June 1 2013, and the outcome is still to be made.⁴

Rape affects a broad spectre of areas of life in relation to psychological and somatic health such as level of functionality, ability to work, social support and life quality.⁵ A prevalence study published by the Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS) on 25 February 2014, report 1/2014, concluded that physical violence and rape constitute serious public health problems.⁶ Rape is one of the worst sufferings a human being can inflict upon another.⁷ It is therefore of great importance that the crime of rape is defined correct in order to ensure that victims of rape can have a fair chance of achieving justice for the evil they have suffered.

1.2 The Method and Structure of the Thesis

The analysis of the International Obligations of Norway is based on the Vienna Convention on the law of treaties of 23 May 1969, and general principles for interpretation of law developed by the respective judicial bodies that enforce the international obligations of Norway, as is today the Norwegian judicial method.⁸ Norway has not ratified the Vienna Convention. However, the Convention expresses largely what is to be considered customary international law,⁹ and will therefore be used as means of interpretation in the analysis of the various international obligations of Norway concerning rape.

⁴ Høringsnotat p. 22-34 E-bok

⁵ Thoresen, Hjemdal (2014) p.127

⁶ Thoresen, Hjemdal (2014) p. 26-27

⁷ *Prosecutor v. Kunarac* (655)

⁸ Echhoff (2011) p. 18

⁹ Ruud (2006) p. 74, 85

First, the current definition of rape in the Section 192 litra a and b of the GCPC will be presented. Relevant case law from the Supreme Court of Norway, preparatory works, Article 96 of the Constitution of Norway and its relevant case law will be referred to as to give the reader an understanding of how rape is defined and interpreted in Norway today.

Secondly, the International Conventions Norway is bound by through the Human Rights Act Section 3 will be presented in order to see how they define rape, and in case, how this definition affects the definition of rape in the GCPC. The relevant Conventions under the Human Rights Act are the European Convention on Human Rights (ECHR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Third, International Criminal law and the definition of rape as crimes against humanity and war crimes in chapter 16 of the Norwegian Penal Code of 2005 (NPC) will be subject to analysis. The provisions in chapter 16 of the NPC are built upon the Rome Statute, where rape is not specifically defined. Practice under the International Criminal Court (ICC), and case law from the International Tribunal on the Former Yugoslavia (ICTY) and the International Tribunal of Rwanda (ICTR), and the impact these Conventions, Tribunals and Court have on the definition of rape in the GCPC will then be sought brought into clarity.

Finally, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) will be subject to analysis as it has already had an impact on the definition of rape in Section 192 of the GCPC.¹⁰ This regional Convention clearly states that the constituent element of rape is lack of consent.

1.3 Definitions

”Lack of consent” is not clearly defined. The definition of “lack of consent” will therefore be sought brought into clarity with the progressive analysis of the International Obligations

¹⁰ Istanbul Convention of 7 July 2011, Høringsnotat

of Norway, how they define rape, and in case how these definitions will affect the definition of rape in the GCPC. Other Norwegian legal expressions differing from International law will be explained progressively as to avoid misunderstandings. Any inaccuracies in translation whether it be Norwegian into English or Swedish into English, is entirely mine.

1.4 Demarcation of Thesis

In Norway there are four conditions of punishment that must exist before criminal liability can be established:

- “(1) A penal provision must cover the action.
- (2) No ground of impunity must exist, such as self- defence or emergency.
- (3) The offender must have incurred subjective guilt (*mens rea*).
- (4) The act must have been committed by a responsible person.”¹¹

This thesis will only discuss criteria (1), and then only *de lege ferenda* whether Norway is bound to change or add “lack of consent” to the objective criteria of Section 192 in the GCPC in order to make its definition of rape compatible with the Country’s International Obligations. The analysis will therefore demarcate towards any other potential issues that might rise from Norway’s potential obligation to change or expand its definition of rape. An exemption is made in regard to Norway’s potential damage liability towards individuals exposed to non-consensual sexual activity in chapter 3.2.5.

The International Covenant for Civil and Political Rights Articles 7 and 17 are similar to Articles 3 and 8 in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and therefore only the ECHR will be subject for analysis in this thesis.¹²

¹¹ Andenæs (1965) p. 94

¹² NOU 2008:4 p. 20

2 The Current definition of Rape in the General Civil Penal Code

2.1 The constituent elements of Rape in Section 192 of the General Civil Penal Code

2.1.1 Introduction

The current definition of rape in Section 192 litra a and b of the General Civil Penal Code of 1902 (GCPC) have four alternative elements that together with sexual activity is defined as rape. Any person can be held liable for rape if that person “engages in sexual activity by means of violence or threats”¹³ cf. Section 192 litra a, or “engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act” cf. Section 192 litra b. “In deciding whether the offender made use of violence or threats or whether the aggrieved person was incapable of resisting the act, importance shall be attached to whether the aggrieved person was under 14 years of age” cf. Section 192 subsection 1.¹⁴ A person can also be held liable of rape after Section 192 litra c, if he or she “by means of violence or threats compels any person to engage in sexual activity with another person, or to carry out similar acts with himself or herself.” The constituent elements of rape are the same in Section 192 litra c and a, therefore only litra a and litra b will be discussed in the following. The prime interest of Section 192 is to protect the individual’s sexual autonomy.¹⁵ Rape as defined in Section 192 of the GCPC, are through preparatory works, case- law, judicial theory and policy considerations given a certain content with the result that there is seldom doubt of the legal content.¹⁶

¹³ GCPC 1902 p. 76

¹⁴ GCPC 1902 p. 76

¹⁵ Andenæs (2004) p. 108

¹⁶ Andenæs (2004) p. 106

2.1.2 Section 192 litra a in the General Civil Penal Code

2.1.2.1 Introduction

In Norway, the preparatory works are important means for statutory interpretation, as the Courts of Norway consider preparatory works as relevant for statutory interpretation.¹⁷

Section 192 in the GCPC was revised in the year of 2000.¹⁸ From the preparatory works in Ot.prp.nr.28 (1999- 2000) it was held in chapter 16 concerning the definition of rape, that rape occurs by the use of different means in order to force sexual activity with another person that is exposed to coercion.¹⁹ “Coercion” was removed as an element of the crime from Section 192 as it could lead to an unwanted focus²⁰ on the aggrieved party’s behaviour in deciding whether the sexual activity was rape or not.²¹ It was held that Section 192 litra a where any person who “engages in sexual activity by means of violence or threats” were to be interpreted as before, only that there was no longer a demand that there had to be used coercion in order to engage in the sexual activity. However there had to be causation between the sexual activity as understood in “by” means of violence or threats. In that way the use of coercion was implied in the causation, in order to achieve the sexual activity.

2.1.2.2 Section 192 litra a, “violence” or “threats”

The preparatory works in Ot.prp.nr.28 (1999-2000) stated that what “violence” or “threats” entail is relative. Whether the conduct of the offender entails both of these is to be deemed according to the situation. In order to determine whether “violence” has been used, there is demanded less intensity in the assault when the victim is a minor, or in other ways is in a vulnerable position towards the offender. The preparatory works referred to a Supreme

¹⁷ Eckhoff (2011) p. 79

¹⁸ L11.08.2000 nr. 76 i kraft straks. § 192

¹⁹ Ot.prp.nr.28 (1999-2000) ch. 16.1.1. p. 111

²⁰ Andenæs (2008) p. 142

²¹ Strl. 1902 § 192

Court verdict²² of which “violence” had occurred when the perpetrator had held his 16-year-old niece tightly against himself, before having an intercourse with her. In Rt. 1991 page 824, the accused had pushed his previous co-habitant into an armchair before he forcibly had intercourse with her. As the “violence” which constituted the crime was not in particular grave, the accused was sentenced to one year and eight months of prison cf. Rt. 1991 page 824.

NOU 2008:4 page 19 holds that “violence” is to be deemed in accordance with the factual circumstances of the case. Typical acts of violence mentioned were strikes, stranglehold, or that the perpetrator pushes the aggrieved party down or holds the aggrieved party’s legs and arms. “Violence” is also considered occurred when the aggrieved party has been unable to get away from the perpetrator. There is no demand that the aggrieved party must have tried to resist the act. Other factors can be taken into consideration such as where the sexual activity has taken place, the aggrieved party’s relationship with the perpetrator, and if the aggrieved party had certain reasons to fear the perpetrator. However, there has to be causation between the “violence” used and the sexual activity in order to amount to rape.²³

“Threats” can involve conduct causing the victim serious fear for his or her life and health, but also other kinds of threats. There is no demand that the “threats” used has to be of a punitive character. Threats can involve setting out false accusations of the victim, or threats of reporting crimes the victim could have previously committed to the police. The less serious the threat is, the less likely it is that the threat had causation with the sexual activity.²⁴

The offender does not have to use violence or threats himself against the aggrieved party. It is enough that he is aware of that the aggrieved party is subject to coercion or threats, and that the aggrieved party would not have consented to the sexual activity under normal cir-

²² Rt. 1989 979

²³ NOU 2008:4 p.19

²⁴ Ot.prp.nr.28 (1999-2000)

cumstances.²⁵ Rt. 2006 page 1319 makes it clear that in incidents where the offender knows that a third-person by the use of violence or threats has caused the aggrieved party to be at the offender's "disposal," and have taken advantage of this, the offender will be held liable for rape under Section 192 litra a.²⁶ The offender in Rt. 2006 page 1319 had leased his house to sex-traffickers. He had an agreement with one of the main traffickers that he could have sex with two of the trafficked women after his own choice. He was aware that the two women were held in captivity and that they were too afraid to resist.²⁷ The offender's defence argued that the accused was convicted wrongly for violating Section 192 litra a, and should rather have been accused for violating Section 192 litra b. The Court concluded that the man had violated Section 192 litra a, as the accused had taken advantage of the coercive circumstances the women were under.²⁸

2.1.3 Section 192 litra b in the General Civil Penal Code

2.1.3.1.1 *Introduction*

Section 192 of the GCPC was revised in the year of 2000.²⁹ Before the revision, any person who engaged in sexual activity with a person who was unconscious or incapable for any other reason of resisting the act was held liable after Section 193 of the GCPC. Section 193 did not define the crime as rape and had a milder maximum sentence. As a result of the revision, the constituent elements of Section 193 was moved to form a new Section 192 litra b.³⁰ The preliminary consideration was to state that engaging in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act, can be as serious as those incidents that traditionally had been deemed as rape cf. Section 192 litra

²⁵ Andenæs (2008) p. 142

²⁶ Andenæs (2008) p. 142

²⁷ Rt. 2006 1319 (11)

²⁸ Rt. 2006 1319 (13)

²⁹ Ot.prp.nr.28 (1999-2000) p. 111, Lov av 11 August 2000 nr. 76

³⁰ Ot.prp.nr.28 (1999-2000) p. 111, Lov av 11 August 2000 nr. 76

a. The understanding of “unconscious” or “incapable for any other reason of resisting the act” was to be interpreted as Section 193 had previously been practiced.

2.1.3.2 Section 192 litra b, “unconscious”

“Unconscious” entails hypnosis, insomnia, as well as illness or other external means that has caused the victim to become unconscious. It is also irrelevant if the victim’s unconsciousness is self-caused for example by intoxication. There is however a borderline of which Rt. 2003 page 687 is an example of. The question before the Supreme Court was whether section 192 litra b entailed an incident where a man continues the sexual activity with a woman who in the beginning consents to this, but after a while falls asleep. The man had been found guilty by the Court of Appeals for having sexual relations with a woman who was “unconscious or of other reasons incapable of resisting the action” cf. Section 192 litra b of the GCPC. The accused claimed in his appeal to the Supreme Court that what he had done was not rape according to Section 192 b of the GCPC, as she had consented to the sexual activity while being awake. In her judgment which the other joined, Judge Coward, held that the wording of the law³¹ – “engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act” (Section 192 litra b), could be interpreted as to entail the situation of which the appellant had been convicted for. Judge Coward held however that this kind of situation was not discussed in the preparatory works, and that the lawmaker most likely had not considered this kind of situation when revising the law. Judge Coward also remarked that this incident had never been considered in previous Supreme Court verdicts. In legal literature she found some comments concerning prior consent, but not in particular concerning those incidents where the sexual activity had been commenced before the afflicted loses her consciousness. Judge Coward put therefore weight to policy considerations, and consideration of the consequences of statutory interpretation. Judge Coward held that on one side this situation would no doubt have been experienced as offending by the aggrieved party after the sexual activity. If this incident

³¹ Rt. 2003 687 (13-19)

were not entailed in Section 192 litra b, it would lead to that the aggrieved party would not have legal protection for any given time to choose consciously to engage or not engage in sexual activity. The offender would often have said to be acting clearly reproachable. However, it was a question of using very serious statutory sections towards that what the law-giver defines as rape - a crime punishable with up to ten years in prison. The situation in the current case was in Judge Coward's opinion so different from those cases sections concerning rape was supposed to entail, and of which had usually been deemed as rape. At the same time this current situation was not an unpractical one, neither in established relationships, nor in youth groups as was the situation of the current case: a couple starts sexual activities that is mutually consensual but the one person falls asleep, due to intoxication or tiredness, without the other stopping the sexual activity. Judge Coward concluded: I've reached my conclusion that there is such a great difference between the degree of offense and blameworthiness compared to what typically is deemed as rape after Section 192, that it would be to go too far to entail these incidents. This must be the rule with some guidelines. Partly must freedom from liability depend on that the offender would not have executed more intrusive actions after the person's partner had fallen asleep. If the accused in our case for instance had proceeded with an intercourse with the afflicted after she had fallen asleep, it would have been a criminal offense, and then after section 192 litra a. Another reservation, which practically is probably not as important, is to be made for those incidents where the unconsciousness occurs because of an epileptic attack, an accident or similar incidents.³²

Judge Coward held that these precisions were without concern for this case. As the facts of the case had unanimously been taken into account by the Court of Appeals, she therefore deemed that after her interpretation of the statutory law in regard to the facts of the current case, the sexual activity did not constitute a criminal offense. In accordance with her voting the Supreme Court unanimously acquitted the accused, as his conduct was not considered rape under Section 192 litra b of the GCPC.

³² Rt. 2003 687 (13-19)

2.1.3.2.1 Section 192 litra b, “incapable for any other reason of resisting the act”.

“Incapable for any other reason of resisting the act” are scenarios meant to protect people who are paralyzed, or having other illnesses that makes them incapable of resisting the sexual activity. Previous case law refers to incidents where the victim suffered from cerebral palsy,³³ multiple sclerosis,³⁴ deep sleep³⁵, being trapped in a taxi and incapable of resisting the attack because of angst,³⁶ and too intoxicated by alcohol that the aggrieved party was incapable of resisting the sexual act, although she was conscious.³⁷ If the offender causes the aggrieved party to become “incapable for any other reason of resisting the act” by adding a drug to her drink by the intent of having sexual relations with the aggrieved party, he will be held liable after Section 192 (1) litra b cf. Section 192 (2) litra b.³⁸

³³ Rt.1961 547, Rt. 1982 578

³⁴ Rt. 1983 1345

³⁵ Rt. 1986 252, Rt. 1989 1309, Rt. 2004 39

³⁶ Rt. 2003 495

³⁷ Rt. 1993 963

³⁸ Rt. 2004 1902

2.2 The Principle of Legality of Criminal Law in Norway

2.2.1 No one may be convicted except according to law

Article 96 of the Norwegian Constitution prescribes:

“No one may be convicted except according to law, or be punished except after a court judgment. (....).”³⁹

“Convicted” is understood as convicted for a crime. “Law” refers to the principle of *nulla poena sine lege*,⁴⁰ a principle that is understood in accordance with Norwegian legal tradition that criminal liability and the reaction towards such behaviour can only be established by statutory law, also called the principle of legality.⁴¹ This means that the judge cannot convict anyone for a crime that is not prescribed by written law, also referred to by the maxim *nullum crimen sine lege scripta*.⁴² Rt. 1952 page 989 is an example of this. A man was accused for violating Section 350 of the GCPC by disturbing the “public peace and order”. The accused had harassed a married woman for a period of three months that had ended an affair with him, by phoning her home multiple times. He was convicted by the city court for disturbing the “public peace and order” cf. Section 350, and was sentenced to 40 days of prison, as a deferred sentence. The Supreme Court unanimously acquitted him. The Court did not find that his conduct had violated Section 350 disturbing “public peace and order,” as his phone-calls had been directed to a private home. The Court deemed the behaviour despicable of which should have evoked criminal liability. As a result of the acquittal, the GCPC was edited a new section 350 a in 1955 criminalizing such harassment.⁴³

³⁹ CN 1814

⁴⁰ Andenæs (2004) p. 105

⁴¹ Andenæs (2004) p. 104

⁴² Cassese (2008) p. 37

⁴³ Lov av 3 juni 1955 nr. 2 § 390 a

2.2.2 No one may be convicted based on customary rules

The principle of legality in Article 96 of the Constitution prohibits criminal liability from being established on the basis of customary rules.⁴⁴ On the other hand customary rules can be used as means for interpretation of criminal liability established by statutory law. The Supreme Court of Norway has developed a judicial method prescribing that crimes have to be defined within a certain degree of specificity.⁴⁵ This principle implies that the statutory law is to be interpreted as it would have commonly been understood/read by citizens. The principle of specificity is in Latin referred to as *nullum crimen sine lege stricta*, which means that criminal offences must be provided for through specific legislation.⁴⁶ The principles of *nulla poena sine lege*, and *nullum crimen sine lege stricta* has traditionally been reckoned as fundamental principles of the rule of law in democratic societies.⁴⁷ The understanding and practice of *nulla poena sine lege*, and *nullum crimen sine lege stricta* in Norway differs from that of common law countries, which prescribes that as long as there is a legal rule, criminal liability can be established.⁴⁸

⁴⁴ Andenæs (2004) p. 104

⁴⁵ See for example Rt. 2009 780

⁴⁶ Cassese (2008) p. 37-38

⁴⁷ Andenæs (2004) p. 105, see also Cassese (2008) p. 37

⁴⁸ See also Cassese (2008) p. 36- 41

2.2.3 “Law” in Article 96 of the Constitution is practiced more narrow than “law” in Article 7 of the European Convention on Human Rights

Article 7 of the ECHR secures that no one is punished without “law”. “Law” within the meaning of the Convention can constitute national or international law, or general principles of law recognized by civilised nations at the time when the crime was committed cf. Article 7 nr. 1 and nr. 2. In the *Case of Rohlena v. the Czech Republic*, the ECtHR in Grand Chamber reiterated that Article 7 of the Convention embodies

”the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable.”⁴⁹

The Court’s task is ”to verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (...) When speaking of “law” Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability.”⁵⁰

⁴⁹ *Rholena v. The Czech Republic* (27)

⁵⁰ *Rholena v. The Czech Republic* (28- 29)

The ECtHR thus interprets “law” as it is practiced in England and other common law countries.⁵¹ In Norway however, the principle of legality is practiced stricter, limiting criminal liability only to be prescribed by domestic statutory law cf. Article 96 of the Constitution.

2.2.4 Article 97 cf. Article 96 of the Constitution absolute the boundaries for criminal liability in Norway

Prohibition against retroactive legislation (*nullum crimen sine proevia lege*⁵²) is prescribed in Article 97 of the Constitution. The Supreme Court of Norway stated in Rt. 2010 page 1445 that the prohibition against retroactive legislation cf. Article 97 complete the fundamental principle that no one can be punished except through statutory law in Article 96. This principle presumes that the statutory law has already entered into force before the crime is committed.⁵³ Article 97 of the Constitution is based on two preliminary considerations. First, the perpetrator shall have opportunity to know what punitive reaction that can possibly threaten him.⁵⁴ Second, the government authorities – the legislative, executive and judicial branch shall be prohibited from placing a punitive reaction on an already committed action out of their own free opinion.⁵⁵ The prohibition against retroactive legislation read together with Article 96 absolute the boundaries for criminal liability under Norwegian jurisdiction.

⁵¹ Andenæs (2004) p. 105

⁵² Cassese (2008) p. 38

⁵³ Rt. 2010 1445 (84-85) cf. Rt. 1946 198 cf. 207-208

⁵⁴ Rt. 2010 1445 (84-85) cf. Rt. 1946 198 cf. 207-208

⁵⁵ Rt. 2010 1445 (84-85) cf. Rt. 1946 198 cf. 207-208

2.2.5 The Supreme Court of Norway practice a strict contextual interpretation of the principle of legality

The Supreme Court of Norway has practiced the principle of legality with varied strictness. The previous commented Rt. 1952 page 989 is an example where the Supreme Court of Norway does not hold anyone liable for an action unless it is prescribed by statutory law. In three verdicts known as “Passbåt-dommene,”⁵⁶ in English “the speedboat verdicts,” concerning the interpretation of “ship” in the GCPC Section 422 second paragraph, the Supreme Court of Norway interpreted the normal understanding of “ship” extensively. The accused in both Rt. 1966 page 916 and Rt. 1973 page 433 claimed that he had not maneuvered a “ship” as this would be a boat of significant size after a normal interpretation and understanding of the wording of the law. The Supreme Court of Norway denied this in both cases, and upheld their verdicts. The Court held in Rt. 1966 page 916 that the primary legislative intent (*ratio legis*) with Section 422 was to create security and to avoid danger for the traffic at sea. Even though the boat at question was a fishing boat with the length of 25 foot, width of 8 foot and a 15-18 Hk engine, there could be no doubt that maneuvering this boat would have a great potential of endangering others and those on-board. The “need” for a punitive reaction was therefore emphasized and the verdict upheld.

In Rt. 1973 page 433, a 17-foot boat made of plastic with an engine of 115 Hk was interpreted as a “ship” in accordance with Section 422. The Court emphasized that this was the legislator’s intent, and referred to the preparatory works and Rt. 1966 page 916. The primary legislative intent behind Section 422, and the potential of danger the boat in question had, was decisive in determining whether the 17-foot plastic boat was a “ship” as Section 422 prescribed. The verdict is an example of where policy considerations such as reproachable/blameworthy actions has been given weight in the interpretation of the wording of the law, in contrast to Rt. 1952 page 989.

The expanding interpretation of “ship” in Section 422 of the GCPC came to a hold in Rt. 1995 page 1734 where the question before the Supreme Court of Norway was if a 14-foot riverboat with a 4 Hk engine was a “ship”. The accused was acquitted with dissent 4-1, as

⁵⁶ Rt. 1966 916, Rt. 1973 433, Rt. 1995 1734

the majority found that the boat in question could not be understood as a “ship” in the understanding of Section 422. The danger potential of the boat was very small as its maximum speed would be 5-6 knots. The Court held that the wording and understanding of “ship” in Section 422 had a borderline, which was reached in this particular case. The Court would therefore not interpret “ship” too extensively even though support of this view could be found in the wording of the law, the preparatory works and policy considerations such as the legislative intent and the general risk for the public, and the demarcation problems that might occur of such a restrictive interpretation of “ship.” The first Judge to deliver her opinion of which the other gave their support, said in an obiter dictum that the use of Section 422 on smaller boats was a practical important question that should be considered by the legislative force. The government took the hint and followed up with a law for smaller boats in 1998 (Lov 1998-06-26 nr. 47 Småbåtloven).

Over the years the Supreme Court of Norway has established a clear and strict practice of the principle of legality. The “Derivative- verdict”⁵⁷ and “Violence against a former Cohabitant- verdict”⁵⁸ are examples of this. In Rt. 2009 page 780 the Supreme Court of Norway deemed gammabutyrolakton (GBL), which was not enlisted on “the drug-list” with authority in the statutory provision for drugs,⁵⁹ not to be considered a derivative of gammahydroksybutryat (GHB), which was enlisted cf. the statutory provision for drugs section 2 and 3.⁶⁰ GHB had been enlisted on “the drug-list” by an administrative decision on July 12 2000 cf. the Statutory Provision for Drugs of 30 June 1978 nr.8, cf. Section 2 and Section 3. The Government held that it was sufficient for criminal liability to be established that the Norwegian Medicines Agency both in a letter and in a press release to the accused had claimed that GBL was entailed by the drug list, being a derivative of GHB, which was enlisted. The Supreme Court deemed that this could not serve as a substitute; only an admin-

⁵⁷ Rt. 2009 780

⁵⁸ Rt. 2011 469

⁵⁹ Narkotikalisten

⁶⁰ Narkotikalisten

istrative decision by the agency would suffice. The Court unanimously found that the chemical definition of derivatives had to be used, which held that GBL was not a derivative of GHB. Even though GBL by the use of easy means could be turned into GHB, the Supreme Court found that an interpretation of the derivative rule in such an expansive way would violate ECHR Art. 7. GBL was enlisted on “the drug-list” by an administrative decision on March 24 2010.

In Rt. 2011 page 469 the question before the Supreme Court was whether violence against a previous co-habitant was entailed in Section 219 which at that time was directed against “any person who by threats, duress, deprivation of liberty, violence or any other wrong grossly or repeatedly maltreats a) his or her former or present spouse, (...) d) any person in his or her care.” The Supreme Court found that a present co-habitant was covered by alternative d), but that an expansion of criminal liability under Section 219 litra a, to also cover a former co-habitant had to be prescribed by statutory law. It was not sufficient that the lawgiver had intended such an interpretation of Section 219 litra a, by making a statutory definition in Section 5, which made co-habitants equivalent to a former or present spouse where the use of a person’s next- of- kin was entailed. The Court held that such an expansion of criminal liability, compared to what followed directly from the wording of Section 219, had to be prescribed by statutory law cf. Article 96 of the Constitution, ECHR Art. 7, and Rt. 2009 page 780 paragraph 21. The Court held that policy considerations such as the “need” for a punitive reaction or other policy considerations that could be taken into account to level previous cohabitants with previous spouses would not suffice. The Prosecutor’s appeal was therefore denied, and the Court of Appeal’s verdict upheld. The accused was therefore not convicted for a felony after Section 219 of the GCPC. Section 219 litra a was expanded to entail a “co-habitant, and former co-habitant” through statutory law of June 24 2011 nr. 32, less than three months after the Supreme Court of Norway in Rt. 2011 page 469 had executed its strict use of the principle of legality in favour of the accused.

In effect, Article 96 of the Constitution, and the strict practice of the principle of legality developed by the Supreme Court of Norway, limits the means for how criminal liability can

be established. This is a fundamental organisation of the “checks and balances” between Norwegian authorities.⁶¹

2.3 Summary and Conclusion

Any person can be held liable for rape after Section 192 if that person “engages in sexual activity by means of violence or threats,”⁶² or “engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act.” The protection of the individual’s sexual autonomy is the prime interest of Section 192.⁶³ What “violence” and “threats” entail is relative and can be deemed in accordance with the factual circumstances of the case. Rape as defined in Section 192 of the GCPC, are through preparatory works, case-law, judicial theory and policy considerations given a certain content with the result that there is seldom doubt of the legal content.⁶⁴ The Supreme Court of Norway has interpreted “unconscious” restrictive cf. Rt. 2003 page 687, refraining from constituting criminal liability in a situation which could be entailed by Section 192 litra b after a normal interpretation of the wording of the law.

Article 96 of the Constitution prescribes that no one may be convicted except according to “law.” “Law” refers to the principle of *nulla poena sine lege*,⁶⁵ a principle practiced in accordance with Norwegian legal tradition establishing criminal liability and the reaction towards such behaviour only by statutory law. This principle has also been referred to as the principle of legality.⁶⁶ Today the Supreme Court of Norway practice the principle of legality with a strict contextual interpretation of the wording of the law, refraining from constituting criminal liability unless statutory law accurately prescribes it cf. Rt. 2009 page

⁶¹ Andenæs (2006) p. 27

⁶² GCPC 1902 p. 76

⁶³ Andenæs (2004) p. 108

⁶⁴ Andenæs (2004) p. 106

⁶⁵ Andenæs (2004) p. 105

⁶⁶ Andenæs (2004) p. 104

780 and Rt. 2011 page 469. The principles set out in Article 96 and Article 97 of the Constitution, interpreted by the Supreme Court is therefore stricter and in favour of the accused than required by international law.⁶⁷

⁶⁷ Cassese (2008) p. 38- 41

3 The International Conventions incorporated into the Human Rights Act Section 3 and their definition of Rape

3.1 The standing of the Human Rights Act in domestic Norwegian Law

3.1.1 Introduction

Law on strengthening human rights in Norwegian law (the Human Rights Act) was passed on May 21 1999.⁶⁸ The aim was to strengthen human rights in Norwegian law cf. Section 1⁶⁹. The preparatory works held that the purpose of the Act is to reduce the uncertainty concerning the human rights Convention's legal role in domestic law, to increase the knowledge concerning them, and to signalize the importance of the human rights role in Norwegian law and community.⁷⁰

Five Conventions have been incorporated into Section 2 of the Human Rights Act, which holds that they "apply to Norwegian law in so far as they are binding on Norway." Norway is a dualistic state, and a special act of implementation is therefore in principle required in order for a treaty to apply as part of domestic law.⁷¹ Incorporation was chosen for the implementation of the treaty obligations into domestic law.⁷² Incorporation is characterized by the State's adoption of legislation or other binding provisions, which establishes that the treaty shall have direct effect as rules of law for national authorities.⁷³ National authorities shall apply the treaty's authentic text, its travaux préparatoires and international law principles of interpretation.⁷⁴

⁶⁸ LOV-1999-05-21-30

⁶⁹ LOV-1999-05-21-30

⁷⁰ NOU 1993:18 p. 166 and Ot.prp.nr. 3 (1998-1999) p. 50

⁷¹ NOU 1993:18 p. 193

⁷² NOU 1993:18 p. 91- 98, Ruud (2006) p. 58-63

⁷³ NOU 1993:18 p. 91- 98, Ruud (2006) p. 58-63

⁷⁴ NOU 1993:18 p. 91- 98, Ruud (2006) p. 58-63

Only two of the five incorporated conventions will be subject for analysis in this thesis. These are the Council of Europe Convention of 4 November 1950 for the protection of Human Rights and Fundamental Freedoms, the European Convention on Human Rights (ECHR), which was incorporated when the Human Rights Act was passed on May 21 1999, and the United Nations International Covenant 18 December 1979 on the Elimination of All Forms of Discrimination Against Women (CEDAW) with Protocol 6 October 1999, which was incorporated by Act of 19 June 2009 nr. 80, and entered into force on June 19 2009.⁷⁵

3.1.2 The Conventions incorporated into the Human Rights Act shall take precedence over conflicting provisions in other legislation

The Conventions incorporated into the Human Rights Act shall take precedence over conflicting provisions in other legislation cf. Section 3 of the Human Rights Act. The Human Rights Act is therefore *Lex Superior* to other domestic legislation.⁷⁶ *Lex Superior* is a principle where legal rules of higher rank take precedence over legal rules of lower rank, in case of conflict.⁷⁷ The Constitution of Norway is *Lex Superior* to the Human Rights Act, as it can be set aside by a decision of the Parliament cf. the Constitution Article 76 and following. The Supreme Court of Norway deem the limits the Constitution sets for the violation of human rights and the boundaries from which the conventions incorporated through the Human Rights Act, as separate legal grounds.⁷⁸

The preparatory works of the Human Rights Act underlined that the incorporation of the human rights conventions into Section 2 would lead to a new legal situation with the superior aim of strengthening the legal standing of individuals in domestic law.⁷⁹ One of the

⁷⁵ Kgl.res. 19 June 2009 nr. 696

⁷⁶ NOU 1993:18 p. 156-161 E-bok

⁷⁷ NOU 1993:18 p. 148- 151

⁷⁸ Rt. 2006 262, see also Andenæs (2006) p. 28

⁷⁹ Innst.O. nr. 51 (1998-1999), p. 6

goals for the incorporation was to influence the state of the law in Norway towards listening to, and to have an open relationship towards the legal practice of the Court in Strasbourg, and other international judicial enforcement organs.⁸⁰ Norwegian case law, in as large extent as possible, is to correspond with what is considered the current international legal interpretation.⁸¹

Concerning the question of conflicting provisions between an incorporated Convention provision and other Norwegian law, the Supreme Court of Norway has stated that this question cannot be resolved through a general principle, but has to be decided upon by an interpretation of the legal provisions in question.⁸² The preceding rule in the Human Rights Act Section 3 entails that Norwegian Courts will have to follow the Convention provision if the interpretation result of the ECHR seems “adequately clear.” This is the rule even if it will lead to that incorporated Norwegian legislation or practice should be set aside.⁸³ The Constitution of Norway is *Lex Superior* to the Human Rights Act and criminal liability for non-consensual rape cannot be established through harmonisation of the Convention provisions. Compliance with the positive obligations under the Human Rights Act in regard of rape can therefore only be ensured by a change or expansion of statutory law cf. Article 76-78 of the Constitution.

⁸⁰ Innst.O. nr. 51 (1998-1999), p. 6

⁸¹ Innst.O. nr. 51 (1998-1999), p. 6

⁸² Rt. 2003 359 (58)

⁸³ Rt. 2003 359 (58)

3.1.3 Article 110 c of the Constitution securing human rights as a source of law of significant weight and influence in domestic law

Article 110 c of the Norwegian Constitution read as follows:

“It is the responsibility of the authorities of the State to respect and ensure human rights.

Specific provisions for the implementation of treaties thereon shall be determined by law.”⁸⁴

The preparatory works of Article 110 c holds that the object and purpose of this article is to underline the importance of human rights in Norway and thus give a “signal effect” to the lawgiver, but not in such a way that individuals can derive any specific rights from it.⁸⁵

Article 110 c is meant to have an important symbolic effect, both domestic and internationally, concerning the weight and importance of the human rights. In regard of the responsibility for the authorities of the State to “respect and ensure human rights”, the preparatory works stated that those acting on behalf of the State are not only to avoid violation of the human rights, but also to take positive measures in order to prevent violations.⁸⁶ This has also been referred to as the principle of double implementation of the Conventions.⁸⁷

Article 110 c of the Constitution was formulated in such a way as to express central values in Norwegian politics of which the Parliament is behind, and of which the Norwegian society should be built upon.⁸⁸ First, it was held that first subsection of 110 c is a binding guideline for Norwegian authorities’ politics. They will not have legal admittance to lead a

⁸⁴ CN 1814

⁸⁵ NOU 1993:18 p. 156-161 E-bok

⁸⁶ NOU 1993:18 p. 158 E-bok

⁸⁷ NOU 1993:18 p. 158 E-bok

⁸⁸ NOU 1993:18 p. 158 E-bok cf. Innst.S.nr. 163 (1991-1992) s. 5 annen spalte

policy that is incompatible with the principle Article 110 c encapsulates.⁸⁹ A breach with this obligation can in theory lead to a constitutional responsibility for the Government and Parliament.⁹⁰

The principle of respecting and ensuring human rights in Article 110 c (1) is also intended to be an important mean for interpreting statutory laws. Human rights are an important source of law with significant weight. This can be derived from “human rights” in Article 110 c (1), held together with the human rights conventions referred to in a footnote of Article 110 c (2), amongst them the ECHR and CEDAW.⁹¹

⁸⁹ NOU 1993:18 p. 159 E-bok

⁹⁰ NOU 1993:18 p. 159 E-bok

⁹¹ NOU 1993:18 p. 159 E-bok

3.2 The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

3.2.1 Introduction

The European Convention on Human Rights was ratified by Norway on January 15 1952, and entered into force on September 3 1953.⁹² The ECHR was incorporated into the Human Rights Act on 21 May 1999⁹³ and given precedence over conflicting provisions in other legislation cf. Section 3 of the Human Rights Act.⁹⁴ The impact of human rights derived from the ECHR in the realm of criminal law in domestic Norwegian law has mainly concerned the rights of the accused.⁹⁵ This might be due to that the defence seek to protect its clients interests at the best of their ability, claiming incompliance with Norway's positive obligations under the ECHR when chance occur.⁹⁶ The Prosecutor only prosecutes people for crimes prescribed by domestic statutory law.⁹⁷ Thus the positive obligations Norway undertakes in regard of protecting people subject to crimes is not developed by any leading actors in court. This is not to be taken into account for that the State Party has no positive obligations under the ECHR in regard of a person subject to crime, for instance rape.⁹⁸

3.2.2 The dynamic and teleological interpretation of the ECtHR constitutes new obligations for the Member States Parties under the ECHR

The European Court of Human Rights (ECtHR) has developed a teleological method for the interpretation of the ECHR. The Court stated in the *Case of Tyrer v. the United Kingdom* that "the Convention is a living instrument which (...) must be interpreted in the light

⁹² St.prp. 83 (1951)

⁹³ LOV-1999-05-21-30

⁹⁴ NOU 1993:18 p. 156-161 E-bok

⁹⁵ NOU 2008:4 p. 20 E-bok, Rt. 2000 996, Rt. 2002 557, Rt. 2003 359

⁹⁶ See for example Rt. 2011 800

⁹⁷ LOV-1981-05-22-25 § 69

⁹⁸ *M.C v. Bulgaria*

of present-day conditions.⁹⁹ The role of the ECtHR is to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged cf. "Article 19 of the Convention and the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights."¹⁰⁰ The ECtHR interprets the wording of the Convention autonomous in order to achieve a unanimous standard for the implementation of the rights that follows from the Convention within the States, which are the High Contracting Parties.¹⁰¹

In contrast to other international treaties, the Court emphasises in its interpretation of the Convention that it contains rights and liberties for individuals within the member states, which are the High Contracting Parties. The Court stated in the *Case of Wemhoff v. Germany*:¹⁰²

"Given that it is a law- making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties."

The ECtHR is not formally bound to follow its previous judgments. The Court considers nevertheless that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.¹⁰³

⁹⁹ *Tyrer v. The United Kingdom* (31)

¹⁰⁰ *Eremia v. The Republic of Moldova* (50)

¹⁰¹ Macdonald (1993) p. 73 cf. Rt. 2002 557 nr. 4

¹⁰² *Wemhoff v. Germany* (8)

¹⁰³ *Christine Goodwin v the United Kingdom* (74)

3.2.3 The weight of judgments from the ECtHR as a source of law in domestic Norwegian Law

The Conventions incorporated into the Human Rights Act Section 2 shall take precedence over conflicting provisions in other legislation cf. Section 3. The preparatory works of the Human Rights Act held that one of the goals for the incorporation of the ECHR was to influence the state of law in Norway towards listening to, and to have an open relationship towards the legal practice of the Court in Strasbourg, and other international judicial enforcement organs.¹⁰⁴ The superior aim was that Norwegian case law in a large extent as possible was to correspond with what is to be considered the current international legal interpretation.¹⁰⁵

Concerning the question of conflicting provisions between an incorporated Convention provision and other Norwegian law, the Supreme Court of Norway has stated that this cannot be resolved through a general principle, but has to be decided upon by an interpretation of the legal provisions in question.¹⁰⁶ The preceding rule of the Human Rights Act Section 3 entail that Norwegian Courts will have to follow the Convention provision if the interpretation result that follows from the ECHR seems adequately clear.¹⁰⁷ This is the rule even if it will lead to that incorporated Norwegian legislation or practice would be set aside.¹⁰⁸ In Rt. 2008 page 1409 the Court stated that it was a clear lawgiver intent behind Section 3 of the Human Rights Act, and that the Conventions incorporated should take precedence when in conflict with domestic provisions in order to strengthen the human rights in domestic law.¹⁰⁹

¹⁰⁴ Innst.O. nr. 51 (1998-1999), p. 6

¹⁰⁵ Innst.O. nr. 51 (1998-1999), p. 6

¹⁰⁶ Rt. 2003 359 (58), see also Rt. 2000 996 and Rt. 2002 557

¹⁰⁷ Rt. 2003 359 (58)

¹⁰⁸ Rt. 2003 359 (58)

¹⁰⁹ Rt. 2008 1409 (74)

The Supreme Court in a plenary session stated in Rt. 2000 page 996 that questions concerning conflicting convention provisions and provisions in other Norwegian legislation cannot be solved by one principle, but through a more specific interpretation of the present legal rules, and that through harmonisation, a potential conflict may fall away.¹¹⁰ Harmonisation is however precluded in order to establish criminal liability under Norwegian domestic law due to the principle of legality cf. Article 96 of the Constitution, and the Supreme Court of Norway's strict practice of this cf. Rt. 2009 page 780, Rt. 2011 page 469.

Judicial literature has stated that “[a]ny statement by way of interpretation by the Commission or the Court is significant, although inevitably the level of generality at which it is expressed or its centrality to the decision on the material facts of the case will affect the weight and influence of any pronouncement.”¹¹¹ The Supreme Court of Norway has concluded that the ECtHR does not make a separation between the weight and influence of its “ratio decidendi” or “obiter dicta”.¹¹² Any statement by the ECtHR can therefore potentially constitute a positive obligation for the Member State Party cf. ECHR art. 1.

3.2.3.1 Summary and Conclusion

Case law from the ECtHR has great weight as a source of law in Norway. In Rt. 2008 page 1409 the Court stated that there was a clear lawgiver intent behind Section 3 of the Human Rights Act, and that the Conventions incorporated should take precedence when in conflict with domestic provisions in order to strengthen the human rights in Norwegian law.¹¹³

¹¹⁰ Rt. 2000 996 under section ”General Comments”

¹¹¹ Harris (1995) p. 18

¹¹² Rt. 2002 557 nr. 3

¹¹³ Rt. 2008 1409 (74)

3.2.4 The constituent elements of rape defined by the ECtHR, interpreted in the light of Articles 3 and 8 of the ECHR

3.2.4.1 The European Convention on Human Rights Article 3

3.2.4.1.1 *Introduction*

The ECtHR has described prohibition against torture to be “one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment (...) Article 3 makes no provision for exceptions and no derogation from it is permissible.”¹¹⁴ Prohibition of torture is therefore *jus cogens*, being of a non-derogable nature, even in times of crisis.¹¹⁵ The prohibition of torture as *jus cogens* implies that it has become one of the most fundamental standards of the international community.¹¹⁶ It therefore imposes on States obligations *erga omnes*, towards all the other members of the international community.¹¹⁷

3.2.4.1.2 *Rape as ill treatment within the meaning of torture in Article 3 of the ECHR*

The European Convention on Human Rights Article 3 concerning prohibition of torture read as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Convention itself does not define what lies in “torture”, “inhuman”, or “degrading treatment or punishment”.

¹¹⁴ *Labita v. Italy* (119)

¹¹⁵ *Al-Adsani v. The United Kingdom* (30-31), *Labita v. Italy* (119), *Aydin v. Turkey* (81)

¹¹⁶ Andenæs, Mads (2011). p. 814

¹¹⁷ *Prosecutor v. Furundzija* (144- 154), Andenæs & Weatherall (2013) p. 760

The Court has interpreted treatment as “inhuman” because it was “applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and “degrading” because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.”¹¹⁸ In order to consider whether a treatment is “degrading” within the meaning of Article 3, “the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3”.¹¹⁹

Ill- treatment and degrading treatment must “attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effect and, in some cases, the sex, age and state of health of the victim.”¹²⁰

The ECtHR deemed rape as a particular form of ill- treatment amounting to torture in the case of *Aydin v. Turkey* in 1997. The Court stated that in “order to determine whether any particular form of ill- treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious and cruel suffering.”¹²¹ The applicant in this case had been raped by an official of the State, while being held in detention. The Court considered that rape of a detainee by an official of the State to be an especially grave and abhorrent form of ill- treatment given

¹¹⁸ *Labita v. Italy* (120)

¹¹⁹ *Peers v. Greece* (68) cf. *Raninen v. Finland* (55)

¹²⁰ *Peers v. Greece* (67) cf. *Ireland v. The United Kingdom* (162) cf. *Case of Dougoz v. Greece* (44)

¹²¹ *Aydin v. Turkey* (82)

the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.¹²² The ECtHR concluded that “the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.”¹²³

Rape is considered to infringe both the physical and psychological right to personal integrity, guaranteed by Article 3 of the ECHR.¹²⁴

3.2.4.1.3 *Summary and Conclusion*

Rape constitutes ill- treatment amounting to torture within the meaning of Article 3 of the ECHR. In the case of *Aydin v. Turkey*, the ECtHR stated that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention.¹²⁵

3.2.4.2 The positive obligations of the States under Article 3 in regard of the definition of rape in the respective Penal Codes of the Member State Parties

The relevant principles concerning the existence of a positive obligation to punish rape and to investigate rape cases was enunciated in the case of *M.C v. Bulgaria* of 4 December 2003.¹²⁶ The applicant alleged that her rights under Articles 3, 8, 13 and 14 of the Convention had been violated. She claimed that domestic law and practice in rape cases and the investigation into the rape of which she had been subject to, did not secure the observance by the respondent State of its positive obligation to provide effective legal protection

¹²² *Aydin v. Turkey* (83)

¹²³ *Aydin v. Turkey* (86)

¹²⁴ *M.C v. Bulgaria*, concurring opinion of judge Tulkens nr. 1

¹²⁵ *Aydin v. Turkey* (86)

¹²⁶ *M.C v. Bulgaria* (149–153)

against rape and sexual abuse.¹²⁷ The applicant, a Bulgarian national alleged that two men had raped her on 31 July and 1 August 1995, being 14 years and 10 months old. The ensuing investigation came to the conclusion that there was insufficient proof of the applicant having been compelled to have sex.¹²⁸ Having unsuccessfully tried to appeal the decision of dismissing her case, the applicant filed a complaint to the ECtHR. The applicant alleged that Bulgarian law and practice did not provide effective protection against rape and sexual abuse. She alleged that only cases where the victim had resisted actively were prosecuted, and that the authorities had not investigated the events of 31 July and 1 August 1995 effectively.

The Court took a general approach as to the existence of a positive obligation to punish rape and to investigate rape cases under the Convention. In regard of the nature and substance of the applicant's complaints, the Court found they should be examined primarily under Articles 3 and 8 of the Convention.¹²⁹ The Court reiterated that the obligation of the High Contracting Parties under Article 1 of the Convention is to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill- treatment, including ill- treatment administered by private individuals.¹³⁰

The Court found "in sum" that "the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the State's positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively

¹²⁷ *M.C v. Bulgaria* (3)

¹²⁸ *M.C v. Bulgaria* (9-10)

¹²⁹ *M.C v. Bulgaria* (148)

¹³⁰ *M.C v. Bulgaria* (149), *A. v. the United Kingdom* (22) *Z and Others v. the United Kingdom* (73-75), *E. and Others v. the United Kingdom*

a criminal- law system punishing all forms of rape and sexual abuse.” The ECtHR concluded that “effective protection against rape and sexual abuse requires measures of a criminal-law nature.”¹³¹ The state of Bulgaria had therefore violated its positive obligations under both Articles 3 and 8 of the Convention.

The Court performed a dynamic interpretation of the Convention under the headline “modern conception of the elements of rape and its impact on the substance of member States’ positive obligation to provide adequate protection.”¹³² States undoubtedly enjoy a wide margin of appreciation in respect of the means to ensure adequate protection against rape. Perceptions of a cultural nature, local circumstances and traditional approaches are in particular to be taken into account.¹³³ However, the “limits of the national authorities’ margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved.”¹³⁴

In order to reach a conclusion of the modern day conception of rape, the ECtHR used the principle of specificity (“Bestimmtheitsgrundsatz”, also referred to by the maxim “*nullem crimen sine lege stricta*”).¹³⁵ Relevant comparative and international law and practice were taken into account. The Court found that the approaches to rape varied significantly from one country to another.¹³⁶

The Court reviewed the definition of rape from several countries such as Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Slovenia, the United

¹³¹ *M.C v. Bulgaria* (185-186)

¹³² *M.C v. Bulgaria* (154)

¹³³ *M.C v. Bulgaria* (154)

¹³⁴ *M.C v. Bulgaria* (155) cf. *Christine Goodwin v. the United Kingdom* (74)

¹³⁵ *Prosecutor v. Furundžija* (177)

¹³⁶ *M.C v. Bulgaria* (89)

Kingdom, the United States of America, and other legal systems such as Australia, Canada and South Africa.¹³⁷ Of the European countries, only Belgium, Ireland and the United Kingdom defined rape as a non-consensual act.¹³⁸

The definition of rape in Article 375 §§ 1 and 2 of the Belgian Criminal Code of 1989 differed from other continental definitions:

“Any act of sexual penetration, of whatever nature and by whatever means, committed on a person who does not consent to it shall constitute the crime of rape.

In particular, there is no consent where the act is forced by means of violence, coercion or ruse or was made possible by the victim’s disability or physical or mental deficiency.”¹³⁹

Ireland representing the common law tradition had a similar definition of rape in section 2 (1) of the Criminal Law (Rape) Act 1981 and section 9 of the Criminal Law (Rape) (Amendment) Act 1990:

“A man commits rape if (a) he has sexual intercourse with a woman who at the time of intercourse does not consent and (b) at the time he knows she does not consent or is reckless as to whether or not she is consenting.”

“It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of the person, any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act.”¹⁴⁰

¹³⁷ *M.C v. Bulgaria* (90, 129- 147)

¹³⁸ *M.C v. Bulgaria* (90, 98, 100)

¹³⁹ *M.C v. Bulgaria* (90)

¹⁴⁰ *M.C v. Bulgaria* (98)

The Penal Codes of continental countries such as the Czech Republic, Denmark, Finland, France, Germany, Hungary, and Slovenia defined rape as when a person coerces another person into sexual penetration or a similar sexual act through violence, threats, surprise or by taking advantage of the person's helplessness/incapacity to defend himself/herself.¹⁴¹ These definitions are similar to the current definition of rape in Section 192 of the GCPC. In particular, Denmark and Finland have similar definitions of rape as Norway, as they belong to the same "legal family" of Scandinavian law (Skandinavisk rettsrealisme).¹⁴²

Thirty- seven States in the United States of America had criminalised non-consensual intercourse.¹⁴³ Lack of consent was also the defining element of rape and sexual abuse in Australia, Canada and South Africa.¹⁴⁴

The Court took into account the Recommendation of the Committee of Ministers of the Council of Europe on the protection of women against violence, which recommended that member States should "penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance;"¹⁴⁵ This Recommendation has today become the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which Norway has signed.¹⁴⁶

The ECtHR quoted judgments from the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Furundžija*¹⁴⁷ and the *case of Kunarac, Kovač and*

¹⁴¹ *M.C v. Bulgaria* (91- 97, 99)

¹⁴² Eng (2007) p. 275- 314

¹⁴³ *M.C v. Bulgaria* (144)

¹⁴⁴ *M.C v. Bulgaria* (147)

¹⁴⁵ *M.C v. Bulgaria* (101), Rec(2002)5

¹⁴⁶ Istanbul Convention

¹⁴⁷ *Prosecutor v. Furundžija*

Vuković,¹⁴⁸ in order to reach a conclusion of how rape should be defined in the light of ECHR articles 3 and 8. In *Prosecutor v Furundžija*,¹⁴⁹ the ICTY defined rape as:

“sexual penetration ... by coercion or force or threat of force against the victim or a third person.”¹⁵⁰

The ECtHR noted that the “terms “coercion”, “force”, or “threat of force” from the *Furundžija* definition were not intended to be interpreted narrowly. However, the Trial Chamber in *Prosecutor v. Kunarac, Kovač and Vuković* defined rape as:

“the actus reus of the crime of rape in international law is constituted by ... sexual penetration ... where [it] occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”¹⁵¹

The ECtHR quoted General Recommendation No. 19 of 29 January 1992 on violence against women issued by the United Nations Committee on the Elimination of Discrimination against Women in paragraph 24, in order to reach a conclusion of how rape should be defined in the light of ECHR articles 3 and 8:

“(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;

¹⁴⁸ *Prosecutor v. Kunarac*

¹⁴⁹ *Prosecutor v. Furundžija*

¹⁵⁰ *M.C v. Bulgaria* (103)

¹⁵¹ *M.C v. Bulgaria* (106)

(b) States parties should ensure that laws against ... abuse, rape, sexual assault and other gender- based violence give adequate protection to all women, and respect their integrity and dignity. ...”¹⁵²

The ECtHR noted that proof of physical force and physical resistance had historically been required under domestic law and practice in rape cases in a number of countries. The Court observed nonetheless that the last decades “have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area.”¹⁵³ “It appears that a requirement that the victim must resist physically is no longer present in the statutes of European countries.”¹⁵⁴

“In common-law countries, in Europe and elsewhere, reference to physical force has been removed from the legislation and/or case- law (...). Irish law explicitly states that consent cannot be inferred from lack of resistance (...). In most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence by the perpetrator. It is significant, however, that in case- law and legal theory lack of consent, not force, is seen as the constituent element of the offence of rape.”¹⁵⁵

The Court observed that Article 152 § 1 of the Bulgarian Criminal Code did not mention any requirement of physical resistance by the victim and defined rape in a manner, which did not differ significantly from the wording found in statutes of other member States. In fact, many legal systems at that time defined rape by reference to the means used by the perpetrator to obtain the victim’s submission.¹⁵⁶ The Court found it difficult to arrive at

¹⁵² *M.C v. Bulgaria* (108)

¹⁵³ *M.C v. Bulgaria* (155 cf. 126-147)

¹⁵⁴ *M.C v. Bulgaria* (157)

¹⁵⁵ *M.C v. Bulgaria* (158-159 cf. 90-97, 99, 130-137)

¹⁵⁶ *M.C v. Bulgaria* (170 cf. 74, 88-100)

safe general conclusions whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, due to the absent of case law explicitly dealing with the question.

“Whether or not a sexual act in a particular case is found to have involved coercion always depends on a judicial assessment of the facts. A further difficulty is the absence of a reliable study of prosecutorial practice in cases which never reached the courts.”¹⁵⁷

The Bulgarian Government was unable to provide copies of judgments or legal commentaries clearly disproving the allegations of a restrictive approach in the prosecution of rape.¹⁵⁸ Also the vast majority of the reported judgments from the Supreme Court concerned rapes committed with the use of significant violence (except those where the victim was physically or mentally disabled). The ECtHR stated that although this was not decisive to whether or not non-consensual sexual activity was penalised, prosecuted, and ending up with final convictions under Bulgarian law, “it may be seen as an indication that most of the cases where little or no physical force and resistance were established were not prosecuted.”¹⁵⁹

Having reviewed international law and other relevant sources, the Court concluded:

“[T]he evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator. Moreover, the development of law and practice in that area reflects the evolution of societies

¹⁵⁷ *M.C v. Bulgaria* (172)

¹⁵⁸ *M.C v. Bulgaria* (173)

¹⁵⁹ *M.C v. Bulgaria* (173)

towards effective equality and respect for each individual's sexual autonomy. (...) the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member State's positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non- consensual sexual act, including in the absence of physical resistance by the victim.”¹⁶⁰

In the light of the above, the Court held that their task in the present case was to examine “whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.”¹⁶¹ The Court concluded that there had been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention, and the applicant was awarded 8 000 EUR in non- pecuniary damage.¹⁶²

The Court reiterated in the *Case of Söderman v. Sweden*,¹⁶³ and in the case of *I.G v. Moldova*¹⁶⁴ that the Member States are obliged within the scope of Article 3 to provide efficient criminal-law provisions, effectively punishing rape and to apply them in practice through effective investigation and prosecution for rape cases, thus establishing the precedence enunciated in the *M.C v. Bulgaria*.

¹⁶⁰ *M.C v. Bulgaria* (164-166)

¹⁶¹ *M.C v. Bulgaria* (167)

¹⁶² *M.C v. Bulgaria* (201)

¹⁶³ *Söderman v. Sweden*

¹⁶⁴ *I.G. v. Moldova*

3.2.4.2.1 *Summary and Conclusion*

Rape has been defined by the ECtHR as ill- treatment amounting to torture within the meaning of Article 3 of the ECHR in several judgments. In accordance with contemporary standards and trends in the area of criminal law, “the member State’s positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non- consensual sexual act, including in the absence of physical resistance by the victim.”¹⁶⁵ The ECtHR reviews whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, has such significant flaws as to amount to a breach of the respondent State’s positive obligations under Articles 3 and 8 of the Convention.¹⁶⁶

3.2.4.3 Failure to provide sufficient penal provisions concerning rape violates the right to respect for private life cf. Article 8 of the ECHR

3.2.4.3.1 *The right to respect for private life cf. Article 8 in regard of rape*

The relevant convention provisions in regard of rape under Article 8 were deemed by the ECtHR in *M.C v. Bulgaria* to be:¹⁶⁷

Article 8

“Everyone has the right to respect for his private ... life...”

“Private life” is a concept, which covers the physical and moral integrity of the person, including his or her sexual life cf. *Case of X and Y v. the Netherlands*.¹⁶⁸

¹⁶⁵ *M.C v. Bulgaria* (164-166)

¹⁶⁶ *M.C v. Bulgaria* (167)

¹⁶⁷ *M.C v. Bulgaria* (110)

¹⁶⁸ *X and Y v. the Netherlands* (22)

3.2.4.3.2 *The positive obligations of a State to ensure respect for private life cf. Article 8*

Concerning the positive obligations of a State to ensure respect for private life, the Court stated in the *Case of X and Y v. the Netherlands* of 26 March 1985:¹⁶⁹

“[A]lthough the object of Article 8 is that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (...). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”

Concerning both his daughter and himself, the applicant, Mr. X, alleged that the right of respect for private life guaranteed in Article 8 had been infringed by the Netherlands. Ms. Y had been raped by the son-in-law (Mr. B) of the directress of the privately-run home for mentally handicapped children. Due to “a gap” in the domestic Code of Criminal Procedure, neither Ms. Y nor her legal guardian Mr. X could appeal to the Court of Appeal concerning the decision of not to open proceedings against Mr. B for the alleged rape. Mr. X claimed that the right to respect for family life in Article 8 entailed that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse, particularly if the children were minors and if the father was their legal representative. The applicants argued that the requisite degree of protection against the wrongdoing in question would only have been provided by means of criminal law.

The Court observed

“that the choice of the means calculated to secure compliance with Article 8 (...) in the sphere of the relations to individuals themselves is in principle a matter that falls within the Contracting States’ margin of appreciation. In

¹⁶⁹ *X and Y v. the Netherlands*

this connection, there are different ways of ensuring “respect of private life”, and the nature of the State’s obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer.”¹⁷⁰

The Government had argued that their civil law system would give the applicant sufficient remedy for the rape she had suffered. The Court disagreed with this, stating that this

“is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal- law provisions; indeed, it is by such provisions that the matter is normally regulated. (...) [T]his is in fact an area in which the Netherlands has generally opted for a system of protection based on the criminal law. The only gap, so far as the Commission and the Court have been made aware, is as regards persons in the situation of Miss Y; in such cases, this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen.”¹⁷¹

The Court found that neither Article 248 nor Article 239 para. 2 of the Criminal Code provided Miss Y “with practical and effective protection.” Having taken into account the nature of the wrongdoing in question, the Court concluded that Miss Y had been a victim of a violation of Article 8 of the Convention. The Court awarded Miss Y just satisfaction for non- pecuniary damage on an equitable basis cf. Article 50 of 3, 000 Dutch Guilders. It also stated that it was “hardly deniable that the Netherlands authorities have a degree of responsibility resulting from the deficiency in the legislation which gave rise to the violation of Article 8.”¹⁷²

¹⁷⁰ *X and Y v. the Netherlands* (24)

¹⁷¹ *X and Y v. the Netherlands* (27)

¹⁷² *X and Y v. the Netherlands* (40)

3.2.4.3.3 *Failure to provide practical and efficient criminal- law provisions in rape cases may constitute a violation of the respect for private life cf. Article 8*

Effective deterrence is indispensable in rape cases, and can be achieved only by criminal-law provisions. Incidents of rape are cases where fundamental values and essential aspects of private life are at stake. Failure to provide practical and efficient protection by the Member States Parties in their respective Penal Codes may therefore constitute a violation of the respect for private life cf. ECHR Article 8.¹⁷³

The ECtHR stated in the *Case of M.C v. Bulgaria* that

“Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape where fundamental values and essential aspects of private life are at stake, requires efficient criminal- law provisions. Children and other vulnerable individuals, in particular are entitled to effective protection.”¹⁷⁴

In the case of *C.A.S and C.S v. Romania*, the first applicant had been raped multiple times by a Mr. P.E. from January 1998 to April 1998 at the age of 7. The Court concluded that there had been a violation of Articles 3 and 8 of the Convention in respect to the first applicant due to the lack of effectiveness of the investigation and its impact on his private and family life. The perpetrator, being a neighbour, was not convicted for his crimes having

¹⁷³ *X and Y v. the Netherlands, M.C v. Bulgaria* (153)

¹⁷⁴ *M.C v. Bulgaria* (150), cf. *X and Y v. the Netherlands* (11-13, 23-24, 27)

entered into a plea bargaining with the prosecution. As a consequence of the rapes the first applicant changed school, and in October 2005 his family moved to another city.¹⁷⁵

The Court reiterated “it has not excluded the possibility that the State’s positive obligation under Article 8 to safeguard the individual’s physical integrity may extend to questions relating to the effectiveness of criminal investigation.”¹⁷⁶ The Court further noted; “the United Nations Committee on the Rights of the Child has emphasised that a series of measures must be put in place so as to protect children from all forms of violence which includes prevention, redress and reparation.”¹⁷⁷ Applying these principles to the current case the Court stated:

“The failure to adequately respond to the allegations of child abuse in this case raises doubts as to the effectiveness of the system put in place by the State in accordance with its international obligations and leaves the criminal proceedings in the case devoid of meaning. The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to meet their positive obligations to conduct an effective investigation into the allegations of violent sexual abuse and to ensure adequate protection of the first applicant’s private and family life.”¹⁷⁸

3.2.4.3.4 Conclusion

Failure to enact criminal-law provisions that effectively punish rape by applying them through effective investigation and prosecution constitutes a violation of the right to respect for private life cf. Article 8 of the ECHR. The effectiveness of the system put in place by the State in accordance with its international obligations shall not leave the criminal proceedings in the case devoid of meaning.

¹⁷⁵ *C.A.S. and C.S. v. Romania* (7-12)

¹⁷⁶ *C.A.S. and C.S. v. Romania* (72)

¹⁷⁷ *C.A.S. and C.S. v. Romania* (72)

¹⁷⁸ *C.A.S. and C.S. v. Romania* (83)

3.2.4.4 Summary and Conclusion

Whereas Article 3 has given the Court ground to define the constituent elements of rape, Article 8 has been used in regard to the efficiency of the criminal investigation and procedural possibility of gaining access to court and possibility to regain redress. Choice of means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation. However, effective deterrence against grave acts such as rape where fundamental values and essential aspects of private life are at stake requires efficient criminal-law provisions.¹⁷⁹ The ECtHR stated in the case of *M.C v. Bulgaria*, "the member State's positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non- consensual sexual act, including in the absence of physical resistance by the victim."¹⁸⁰ In regard of the constituent elements of rape the ECtHR's interpretation of Article 3 seems more relevant. However the ECtHR's interpretation of Article 8 may also shed light on the State's positive obligations concerning the definition of rape in their criminal code. The effectiveness of the system put in place by the State in accordance with its international obligations shall not leave the criminal proceedings in the case devoid of meaning cf. Article 8 and the case of *C.A.S and C.S v. Romania*. The ECtHR review allegations of breach on Articles 3 and 8 separately. However, the obligations under Articles 3 and 8 are viewed altogether in deciding whether a State's Criminal Code and practice in regard of rape is in compliance with the Convention. A deficiency in the legislation which constitutes a breach of Article 3 or 8 may cause financial liability for the State cf. Article 41 of the Convention.

¹⁷⁹ *M.C v. Bulgaria* (150)

¹⁸⁰ *M.C v. Bulgaria* (164-166)

3.2.5 Conflicting provisions between the definition of rape in Article 3 and 8 of the ECHR and the definition of rape in Section 192 of the GCPC cf. the Human Rights Act Section 3

The ECHR is a Convention incorporated into the Human Rights Act and shall therefore take precedence over conflicting provisions in other legislation cf. Section 3 of the Human Rights Act.¹⁸¹ The Supreme Court stated in Rt. 2008 page 1409 that there was a clear law-giver intent behind Section 3 of the Human Rights Act, and that the Conventions incorporated should take precedence when in conflict with domestic provisions in order to strengthen the human rights in domestic law.¹⁸²

The ECtHR stated in the case of *M.C v. Bulgaria*; “the member State’s positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non- consensual sexual act, including in the absence of physical resistance by the victim.”¹⁸³ The current definition of rape in Section 192 litra a and b of the GCPC have four alternative elements that together with sexual activity is defined as rape, and will be discussed as one in the following.¹⁸⁴ From a normal understanding of the wording of the law “threats”, “violence”, “unconscious”, and “incapable for any other reason of resisting the act” differ from “any non-consensual” sexual act (emphasis added). The constituent elements of rape in Section 192 set up a demand of a certain type of action in order to constitute criminal liability for rape, for example “violence” has to provide causation with the sexual activity.¹⁸⁵

¹⁸¹ LOV-1999-05-21-30

¹⁸² Rt. 2008 1409 (74)

¹⁸³ *M.C v. Bulgaria* (164-166)

¹⁸⁴ See also chapter 2 of this thesis

¹⁸⁵ See also chapter 2 of this thesis

The ECtHR observed in the case of *M.C v. Bulgaria* that Article 152 § 1 of the Bulgarian Criminal Code did not mention any requirement of physical resistance by the victim and defined rape in a manner, which did not differ significantly from the wording found in statutes of other member States.

The Bulgarian Criminal Code Article 152 § 1 defined rape as:

“sexual intercourse with a woman

- (1) incapable of defending herself, where she did not consent;
- (2) who was compelled by the use of force or threats;
- (3) who was brought to a state of helplessness by the perpetrator.”

According to Bulgarian domestic law an accused person may only be found guilty of rape if it has been established that he had sexual intercourse with a woman in circumstances covered by one of the three sub- paragraphs.¹⁸⁶

The constitute elements of rape in Section 192 of the GCPC are similar to the Bulgarian definition, yet the ECtHR held in *M.C v. Bulgaria* that:

“What is decisive, however, is the meaning given to words such as “force” or “threats” or other terms used in legal definitions. For example, in some legal systems “force” is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victim’s consent or because he held her body and manipulated it in order to perform a sexual act without consent. (...) despite differences in statutory definitions, the courts in a number of countries have developed their interpretation so as to try to encompass any non- consensual sexual act.”¹⁸⁷

¹⁸⁶ *M.C v. Bulgaria* (72-77)

¹⁸⁷ *M.C v. Bulgaria* (171 cf. 95, 130- 147)

Case law from the Supreme Court of Norway concerning rape does not show a development as to try to encompass any non-consensual sexual act cf. Rt. 2003 page 687. This might be due to that rape as defined in Section 192 of the GCPC, are through preparatory works, case-law, judicial theory and policy considerations given a certain content with the result that there is seldom doubt of the legal content.¹⁸⁸ As of today, rape cases before the Supreme Court of Norway mainly concerns the sentence level (Rt. 2008 page 890), or whether the action should be subsumed under litra a or b of Section 192 (Rt. 2006 page 1319), not whether the sexual act was non-consensual.

In order to establish criminal liability in domestic Norwegian law, the crime has to be prescribed by statutory “law” cf. Article 96 of the Norwegian Constitution. The Constitution of Norway being *Lex Superior* to the Human Rights Act thus prevents Norwegian Courts from interpreting criminal liability for non-consensual rape through harmonisation, based on case law from the ECtHR as it constitutes “law” under Article 7 of the ECHR.¹⁸⁹

The Public Prosecution in Norway does not prosecute a person for a crime unless statutory law prescribes it, and the prosecutor believes he is guilty cf. § 69 of the Criminal Procedural Code of 1981. If non-consensual rape is not penalised, no case law will be derived.

A person who has experienced non-consensual rape can in theory try and prosecute the offender by herself before court as a civil criminal proceeding cf. § 429 of the Criminal Procedural Code of 1981. It is unlikely however that she will succeed, as the Courts of Norway do not convict anyone for a crime that is not prescribed by statutory law cf. the Norwegian Constitution Article 96, Rt. Rt. 2009 page 780, and Rt. 2011 page 469.

In NOU 2006:10 concerning the rights of the aggrieved party in criminal proceedings, the preparatory works held that the main question before the ECtHR in *M.C v. Bulgaria* was

¹⁸⁸ Andenæs (2004) p. 106

¹⁸⁹ Rt. 2000 996 under section ”General Comments”

whether Bulgaria's legislation and investigation of rape cases was in compliance with the State's positive obligations under ECHR art. 8.¹⁹⁰ The NOU stated that it followed from *M.C v. Bulgaria* a positive obligation to penalise any non-consensual sexual activity.¹⁹¹ NOU 2006:10 concluded that the positive obligations under ECHR 8 required effective prosecution and investigation of rape cases.¹⁹² No further regard was taken into the definition of rape held by the ECtHR under Article 3 of the Convention.¹⁹³

A report from the Norwegian Director General of Public Prosecution from 2007 with regard to the case of *M.C v. Bulgaria*, stated that Article 3 and 8 constitutes a positive obligation for the State to the penalise and effective prosecution of any non-consensual sexual act.¹⁹⁴ The report concluded that the procedural rights of victims of rape were under development under the Convention.¹⁹⁵ No further regard was taken into whether the definition of rape was in compliance with Article 3 and 8 of the ECHR.

The preparatory works of NOU 2008:4 concerning Human Rights and rape stated that the ECHR mainly protect individuals from infringements from the State. In regard to Criminal Law it was claimed that the ECHR mainly provide the accused protection against infringements. As examples, the protection against self-incrimination, the presumption of innocence, and arbitrary imprisonment was mentioned.¹⁹⁶ In regard to amongst ECHR Article 3 and 8, it was stated that it could be no doubt that the Section 192 of the GCPC was in compliance with international demands to protect individuals against sexual offences.¹⁹⁷ No further regard was taken as to whether the definition of rape in Section 192 of the GCPC

¹⁹⁰ NOU 2006:10 p. 89

¹⁹¹ NOU 2006:10 p. 89

¹⁹² NOU 2006:10 p. 89

¹⁹³ *M.C v. Bulgaria* (166)

¹⁹⁴ Rapport nr. 1/2007 p. 18-19

¹⁹⁵ Rapport nr. 1/2007 p. 18-19

¹⁹⁶ NOU 2008:4 p. 20 E-bok

¹⁹⁷ NOU 2008:4 p. 20 E-bok

was in compliance with ECHR Articles 3 and 8, dynamically interpreted by the ECtHR, even though the case of *M.C v. Bulgaria* was made final on 4 December 2003.

Legal Secretary of the EFTA Court, Mr. Gjermund Mathisen stated in an article from 2006 concerning the internationalization of Norwegian Criminal law, that human rights will leave its marks also on general criminal law. Mr. Mathisen referred to *M.C v. Bulgaria* and its conclusion in regard to the State's positive obligation after ECHR Articles 3 and 8 to establish effective penal provisions against rape, which have to entail "any non-consensual sexual act, including in the absence of physical resistance by the victim."¹⁹⁸

A Swedish report analysed the case of *M.C v. Bulgaria* in SOU 2010:71 page 17-18, in order to clarify the positive obligations of Sweden in relation to the constitute elements of rape in the Swedish Penal Code.¹⁹⁹ Sweden has a similar definition of rape as stated in Section 192 of the GCPC as of spring 2014.²⁰⁰ The report concluded that *M.C v. Bulgaria* did not obligate Sweden to define rape in a specific way. On the other hand it was concluded that the Swedish material criminal law and interpretation thereof should be practiced in order to fulfil the obligations of Article 3 and 8 of the ECHR, as stated in *M.C v. Bulgaria*. These obligations involved that non-consensual sexual activity had to be penalised. It could therefore be questioned if the present statutory legislation and practice fully satisfied the positive obligations of the Convention.²⁰¹ The committee did not recommend that lack of consent should be the constitute element of rape so as to place the lack of consent at the centre of the crime. Instead a new penal provision named "sexual assault" where non-consent would constitute the element of crime was suggested in order to make up for the weaknesses caused by the lack of criminalising non-consensual activity in the Swedish

¹⁹⁸ Mathiesen (2006) p. 3 cf. *Case of M.C v. Bulgaria* (166)

¹⁹⁹ SOU 2010:71

²⁰⁰ See SOU 2010:71 p. 137, Brottsbalken 2 del. Om brotten 6 kap. Om sexualbrott § 1

²⁰¹ SOU 2010:71 p. 17-18, see also p. 198- 204 E-bok

Penal Code.²⁰² Swedish Law Professor Madeleine Leijonhufvud was however of the opinion that the outcome of *M.C v. Bulgaria* obligated Sweden to revise the definition of rape in the Swedish Penal Code.²⁰³ Professor Leijonhufvud concluded that Sweden is obligated to have a statutory provision that criminalizes non-consensual sexual activity.²⁰⁴ The Swedish Government proposed on 4 February 2013 a change of the definition of rape in the Swedish Penal Code. This involved changing the definition of rape in that "hjälpöst tillstånd" was exchanged with "särskilt utsat situation".²⁰⁵ This change was purposed to clarify that also situations where the person subject to rape reacts with passivity is entailed within the definition of rape.

In contrast, English statutory law and practice has lack of consent as the constituent element of rape cf. Section 1 of the Sexual Offences (Amendment) Act 1976, see also *DPP v. Morgan (1976) AC 182*. The case of *Julian Assange v. Sweden* 2 November 2011, illustrates that there are incidents of non-consensual sexual activity that are considered rape in accordance with English law, but do not constitute an offence of rape in Norwegian law.

The Swedish Prosecutor alleged that Julian Assange were to be arrested and surrendered to Sweden for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order, due to allegations of sexual violations of two Swedish women during 13- 18 of August 2010.²⁰⁶ Mr. Julian Assange had appealed a judgment given on 24 February 2011 ordering his extradition to Sweden on several grounds.²⁰⁷ The appeal was dismissed.²⁰⁸

²⁰² SOU 2010:71 p. 17-18 E-bok

²⁰³ SOU 2010:71 p. 199

²⁰⁴ SOU 2010:71 p. 200

²⁰⁵ Brottsbalken 2 del. Om brotten 6 kap. Om sexualbrott § 1

²⁰⁶ *Julian Assange v. The Swedish Prosecution* (1-7)

²⁰⁷ *Julian Assange v. The Swedish Prosecution* (5)

²⁰⁸ *Julian Assange v. The Swedish Prosecution* (161)

In regard to rape cases, English law holds that if rape is punishable in the issuing Member State by a custodial sentence or detention order for a maximum period of at least three years as the law of the issuing Member State defines them should give rise to surrender pursuant to an European Arrest Warrant (EAW).²⁰⁹ However, the facts set out in the EAW must be such as to impel the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged. The Court held that it was not necessary to identify in the description of the conduct the mental element of *mens rea* required under the law of England and Wales for the offence; it was sufficient if it could be inferred from the description of the conduct set out in the EAW.²¹⁰ Mr. Assange argued that if the facts of offence 4²¹¹ had been fairly and accurately described in the EAW, it would not have disclosed the offence of “rape”.²¹² Offence 4 of the EAW read:

“On 17 August 2010, in the home of the injured party (SW) in Enköping, Assange deliberately consummated sexual intercourse with her by improperly exploiting that she, due to sleep, was in a helpless state. It is an aggravating circumstance that Assange, who was aware that it was the expressed wish of the injured party and a prerequisite of sexual intercourse that a condom be used, still consummated unprotected sexual intercourse with her. The sexual act was designed to violate the injured party’s sexual integrity.”²¹³

Mr. Assange submitted that if the part of SW’s statement relating to 17 August 2010 was read in its entirety, a fair and accurate description of the conduct would have made clear her consent to sexual intercourse or alternatively a reasonable belief on his part that she

²⁰⁹ *Julian Assange v. The Swedish Prosecution* (104)

²¹⁰ *Julian Assange v. The Swedish Prosecution* (57, 70)

²¹¹ *Julian Assange v. The Swedish Prosecution* (59)

²¹² *Julian Assange v. The Swedish Prosecution* (105, 120)

²¹³ *Julian Assange v. The Swedish Prosecution* (3)

consented.²¹⁴ SW had met Mr. Assange and others during a lunch on 14 August 2010. SW contacted Mr. Assange on 16 August 2010 and invited him to her house.

“In the bedroom he took her clothes off; they were naked together on the bed and engaged in sexual foreplay on the bed. He rubbed his penis against her. She closed her legs because she did not want to have intercourse with him unless he used a condom. After a period of some hours, he went to sleep. For a long time she had lain awake, but then she also fell asleep. They then had sexual intercourse with him using a condom. They fell asleep and woke and had sex again. They had breakfast. They had sex again with a condom only on the glans of his penis. Her statement then describes in some detail the conduct that forms the basis of Offence 4. She fell asleep, but was woken up by his penetration of her. She immediately asked if he was wearing anything. He answered to the effect that he was not. She felt it was too late and, as he was already inside her, she let him continue. She had never had unprotected sex. He then ejaculated inside her.”²¹⁵

The codified statute of Section 1 (1) of the Sexual Offences Act 2003 of England and Wales set out the offence of rape: “It is an ingredient of each offence that there is no consent by the person penetrated or assaulted and no reasonable belief by the defendant that the person is consenting.”²¹⁶

The basic definition of consent is set out in Section 74:

“For the purposes of this part, a person consents if he agrees by choice and has the freedom and capacity to make that choice.”²¹⁷

²¹⁴ *Julian Assange v. The Swedish Prosecution* (120)

²¹⁵ *Julian Assange v. The Swedish Prosecution* (121-122)

²¹⁶ *Julian Assange v. The Swedish Prosecution* (81, see 78-81)

²¹⁷ *Julian Assange v. The Swedish Prosecution* (81)

Section 77 defines “the relevant act” for the offence of rape as the defendant intentionally penetrating, with his penis, the vagina of another person.²¹⁸

Section 75 which applies to rape read:

(1) If in proceedings for an offence to which this section applies it is proved—

(a) that the defendant did the relevant act,

(b) that any of the circumstances specified in subsection (2) existed, and

(c) that the defendant knew that those circumstances existed,

the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2) The circumstances are that---

(d) the complainant was asleep, then she is to be taken not to have consented to sexual intercourse.²¹⁹

The Court considered first what is meant by rape as Mr Assange had contended that there had to be a description of what is recognisable as rape as that term is used “in the language and law of European countries”.²²⁰ “There is, of course, no standard definition of rape”, the Court recalled.²²¹ In *M.C v Bulgaria* the Strasbourg Court concluded that the trend is to regard “lack of consent as the essential element of rape.”²²² “This is confirmed by a more recent study: “Different systems, similar outcomes? Tackling attrition in reported rape cases across Europe” by Lovett and Kelly published by the Child and Women Abuse Studies

²¹⁸ *Julian Assange v. The Swedish Prosecution* (82)

²¹⁹ *Julian Assange v. The Swedish Prosecution* (117)

²²⁰ *Julian Assange v. The Swedish Prosecution* (107)

²²¹ *Julian Assange v. The Swedish Prosecution* (108)

²²² *Julian Assange v. The Swedish Prosecution* (108)

Unit of London Metropolitan University in 2009. The definitions set out show a wide variation with coercion being required in some states and lack of consent in others.”²²³

The Court concluded that the

“intentional penetration achieved by coercion or where consent is lacking to the knowledge of the defendant would be considered to be rape. In our view on this basis, what was described in the EAW was rape. Coercion evidences knowledge of lack of consent and lack of reasonable belief in consent. A requirement of proof of coercion, if that is what Swedish law requires, is a more onerous test for the prosecution to satisfy than the test for consent in the 2003 Act; it necessarily means however that the allegation that the defendant knew of the absence of consent or had no reasonable belief in consent, is made out in the description of the offence.”²²⁴

The Court found that there was no inconsistency between the particulars in the EAW which set out that helpless state as being asleep, and the classification of rape in Sweden, as the Svea Court of Appeal had considered offence 4 and raised no objection to it.²²⁵

In reviewing the facts of offence 4 under the law of England and Wales the Court stated

“that a jury would be entitled to find that consent to sexual intercourse with a condom is not consent to sexual intercourse without a condom which affords protection. As the conduct set out in the EAW alleges that Mr Assange knew SW would only have sex if a condom was used, the allegation that he had sexual intercourse

²²³ *Julian Assange v. The Swedish Prosecution* (108)

²²⁴ *Julian Assange v. The Swedish Prosecution* (109)

²²⁵ *Julian Assange v. The Swedish Prosecution* (115)

with her without a condom would amount to an allegation of rape in England and Wales.”²²⁶

The Court considered that the essential complaint made about the fairness and accuracy of the description of the offence is that it did not set out the context to which was just referred. Mr. Assange contended that the offence of rape could not be inferred, as the context makes it clear that she consented or he had reasonable belief in her consent.²²⁷ The Court disagreed, as it was

“quite clear that the gravamen of the offence described is that Mr Assange had sexual intercourse with her without a condom and that she had only been prepared to consent to sexual intercourse with a condom. (...) the fact of protected sexual intercourse on other occasions cannot show that she was, or that Mr Assange could reasonably have believed that she was, in her sleep consenting to unprotected intercourse. The fact that she allowed it to continue once she was aware of what was happening cannot go to his state of mind or its reasonableness when he initially penetrated her. Once awake she was deciding whether to let him go on doing what he had started. However it is clear that she is saying that she would rather he had not started at all and had not consented. (...) It is clear that the allegation is that he had sexual intercourse with her when she was not in a position to consent and so he could not have had any reasonable belief that she did.”²²⁸

The previous commented Rt. 2003 page 687,²²⁹ illustrates that non-consensual sexual activity is not considered rape under Section 192. Unprotected non-consensual intercourse cannot be considered rape in accordance with Section 192 as it stands today cf. Rt. 2009 page

²²⁶ *Julian Assange v. The Swedish Prosecution* (116)

²²⁷ *Julian Assange v. The Swedish Prosecution* (123)

²²⁸ *Julian Assange v. The Swedish Prosecution* (124-126)

²²⁹ See chapter 2, 2.1.1.2.2 Section 192 litra b, ”unconscious”

780, Rt. 2011 page 469 cf. Article 96 of the Constitution. This differs significantly from English law and practice, where rape is considered to have occurred when the aggrieved party simply did not consent to unprotected intercourse, when the perpetrator had no reasonable expectancy that she would have consented to sex without a condom.

As of spring 2014, the author is not aware of that there are any Norwegian Supreme Court verdicts that specifically deal with the question of whether the definition of rape in the GCPC is in compliance with Articles 3 and 8 of the ECHR, dynamically interpreted by the ECtHR. The Supreme Court of Norway has however given weight to international development of law in deciding whether a domestic statutory law should be given an additional obligation.²³⁰ However, the strict practice of the principle of legality by the Supreme Court of Norway cf. “law” in Article 96 of the Constitution, expressed in amongst Rt. 2009 page 780 and Rt. 2011 page 469, prevents Norwegian Courts from interpreting non-consensual sexual activity as rape cf. the current definition of rape in Section 192 of the GCPC.

The Ministry of Justice and Public Security proposed in a hearing, which ended on June 1 2013, that Section 192 of the GCPC should be added an additional *litra d* to Section 192 penalizing non- consensual sexual activity.²³¹ The outcome of this hearing is still to be made. The proposal of statutory law revision might indicate that non-consensual rape in Norway goes unpunished, as it is not currently penalized in Section 192 of the GCPC.²³² This could also explain as to why there are no Supreme Court verdicts concerning non-consensual rape.

²³⁰ Cf. Rt. 2010 1170 (55)

²³¹ Høringsnotat.

²³² Høringsnotat p. 22-34, p. 31-35 E-bok

3.2.5.1 Summary and Conclusion

There are conflicting provisions between the definition of rape developed by the ECtHR in the *M.C v. Bulgaria*, interpreted in the light of Article 3 and 8 of the ECHR, and the definition of rape in Section 192 of the cf. Section 3 of the Human Rights Act. The definition of rape as it is prescribed in Section 192 today does not penalize *any* non-consensual sexual acts cf. Articles 3 and 8 of the Convention and *M.C v. Bulgaria*. The Supreme Court of Norway practice a strict interpretation of the statutory “law”, which limits what the current definition of rape in Section 192 of the GCPC can entail.²³³ The Courts of Norway is therefore de facto limited from interpreting Section 192 expansively, and cannot penalize an action that is not covered by the wording of the provision cf. Rt. 2009 page 780 and Rt. 2011 page 469. The Courts of Norway and thus the Prosecution of Norway will therefore not convict or prosecute anyone for non-consensual sexual activity.

3.2.6 Positive obligation for the Member State Party to penalize any non-consensual sexual act

The positive obligations of the Member State Parties under Articles 3 and 8 of the Convention must be seen as “requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”²³⁴ Section 192 can be brought in compliance with Articles 3 and 8 of the ECHR by two alternatives. Either by providing an extra litra d to Section 192 as to penalize non-consensual sexual activity, which the Norwegian Department of Judicial Affairs suggested in an official hearing ending on June 1 2013.²³⁵ Or to redefine rape entirely by defining the crime of rape as having occurred when a person does not consent to the sexual activity, like the Belgian definition of rape in Article 375 §§ 1 and 2 of the Belgian Criminal Code of 1989:

²³³ Article 96 of the Constitution of Norway, Rt. 2009 780, Rt. 2011 469

²³⁴ *M.C v. Bulgaria* (164-166)

²³⁵ Høringsnotat p. 31-35 E-bok

“Any act of sexual penetration, of whatever nature and by whatever means, committed on a person who does not consent to it shall constitute the crime of rape.

In particular, there is no consent where the act is forced by means of violence, coercion or ruse or was made possible by the victim’s disability or physical or mental deficiency.”²³⁶

Either or, this is a responsibility for the legislative branch cf. the Constitution Articles 76-78. These supranational obligations, has been described by Norwegian judicial scholars to de facto realize democratic rights for Norwegian citizens, being a result of a democratic process.²³⁷ One of the main aims of incorporating Conventions into the Human Rights Act was to ensure that Norwegian case law in as large extent as possible, correspond with what is to be considered the current international legal interpretation.²³⁸ In the realm of criminal law, changing or expanding statutory law can only ensure this. A potential perpetrator is thus secured foreseeability in regard to the punitive reaction that might threaten him, and protected against arbitrariness cf. the Constitution Articles 96 and 97, cf. Rt. 2009 page 780 and Rt. 2011 page 469. Finally, a person subject to non-consensual sexual activity is provided with protection under the law as the matter is criminalized. One might claim that this is democracy de facto.²³⁹

²³⁶ *M.C v. Bulgaria* (90)

²³⁷ Graver (2012) p. 100- 110, Sand (2005) p. 15-39

²³⁸ Innst.O. nr. 51 (1998-1999) p. 6

²³⁹ Graver (2012) p. 100- 110, Sand (2005) p. 15-39

3.2.7 Potential damage liability for the State of Norway towards individuals exposed to non-consensual sexual activity

3.2.7.1 Legal ground to claim compensation from the State of Norway for damage resulting from non-performance of obligation under the ECHR

The State of Norway was held liable for the lack of protection of a persecuted woman (NN) in Rt. 2013 page 588. The Supreme Court found that NN's rights under ECHR Article 8 had been violated, but did not conclude as to whether the persecution amounted to a breach of Article 3.²⁴⁰ Two criteria were posed as to whether the State of Norway could be held liable for lack of protecting NN from persecution. The first question to be decided upon is whether the man's persecution of the woman violated her rights under Article 8 or 3. If the answer is yes, the second question is then whether the State of Norway can be held liable for failure to fulfil its obligation to protect her.²⁴¹

3.2.7.1.1 *A third party's non-consensual sexual activity with another person constitutes a violation of Articles 3 and 8 under the ECHR*

Non-consensual sexual activity initiated by a person (A) with another person (B), constitutes a violation of B's rights under Article 3 and 8 of the ECHR cf. *M.C v. Bulgaria*.²⁴²

3.2.7.1.2 *Has the State of Norway failed to secure its obligation to penalise any non-consensual sexual act?*

Article 1 of the ECHR prescribes: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In

²⁴⁰ Rt. 2013 588 (34, 40)

²⁴¹ Rt. 2013 588 (33)

²⁴² *M.C v. Bulgaria* (164-166)

regard to the definition of rape, “the member State’s positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non- consensual sexual act, including in the absence of physical resistance by the victim.”²⁴³ This positive obligation was stated in the case of *M.C v. Bulgaria* made final on 4 December 2003.

The Supreme Court acknowledged in Rt. 2013 page 588 that the obligation to “secure” to everyone within their jurisdiction the rights and freedoms of the Convention would amount to that the State could have an obligation in view of the circumstances to take necessary steps to prevent that private individuals infringe each other’s rights under the Convention.²⁴⁴

The principle of legality cf. Article 96 of the Constitution of Norway, and strict interpretational practice by the Supreme Court of Norway prevents Norwegian Courts from interpreting Section 192 as to entail non-consensual sexual activity. The responsibility to ensure that individual’s are protected against non-consensual sexual activity is therefore political.

The preparatory works of NOU 2008:4 concerning Human Rights and rape stated that the ECHR mainly protect individuals from infringements from the State. In regard to amongst ECHR Article 3 and 8, it was held that it could be no doubt that Section 192 of the GCPC was in compliance with international demands to protect individuals against sexual offences.²⁴⁵ No further regard was taken as to whether the definition of rape in Section 192 of the GCPC was in compliance with ECHR Articles 3 and 8, dynamically interpreted by the ECtHR. In contrast, Sweden discussed the implications of *M.C v. Bulgaria* thoroughly in SOU

²⁴³ *M.C v. Bulgaria* (164-166)

²⁴⁴ Rt. 2013 588 (41)

²⁴⁵ NOU 2008:4 p. 20 E-bok

2010:71.²⁴⁶ As a result, prepositions were posed in order to ensure that the Swedish Penal Code was in compliance with the positive obligations under the ECHR.²⁴⁷

The Norwegian Ministry of Justice and Public Security finished an official hearing on June 1 2013 adding “lack of consent” to the sexual activity as rape in an additional letter d to Section 192 of the CGPC.²⁴⁸ This proposal came as a consequence of the Committee on the Elimination of All Discrimination of Women’s Eight Periodic Report of Norway, and Norway’s Signature of the Istanbul Convention.²⁴⁹ The State’s positive obligation under ECHR Article 3 and 8 was not mentioned.

Legal Secretary of the EFTA Court, Mr. Gjermund Mathisen stated in an article from 2006 that *M.C v. Bulgaria* posed a positive obligation on the Member State Party to penalise any non- consensual act.²⁵⁰

Claims for compensation for injury resulting from non- performance of an international obligation has been acknowledged elsewhere in Europe:

”For instance, a international decision that a particular statute is in violation of international law and that that wrong needs to be removed normally could not be implemented by a national court, but rather would be a task for political brnaches. On the other hand, a national court could play a role in securing compensation for violation of a human right, where that has been determined by an international court.”²⁵¹

²⁴⁶ SOU 2010:71

²⁴⁷ SOU 2010:71 p. 17-18, 199

²⁴⁸ Høringsnotat p. 22-34 E-bok

²⁴⁹ Høringsnotat p. 22-34 E-bok

²⁵⁰ Mathiesen (2006) p. 3 cf. *M.C v. Bulgaria* (166)

²⁵¹ Nollkaemper (2013) p. 8

It cannot thus be said that Norwegian authorities have done what is sufficient in order to ensure protection of the sexual autonomy of private individuals who has suffered non-consensual sexual activity cf. ECHR Articles 3 and 8 and *M.C v. Bulgaria*. Norway has therefore failed to comply with this obligation, as the matter has not been criminalised after the case of *M.C v. Bulgaria* was made final.²⁵² As a result, any person who has been exposed to a non-consensual sexual act can hold the State of Norway subject to liability, as the matter is not penalised and effectively prosecuted.

3.2.7.1.3 Compensation for damages to persons subject to non-consensual sexual activity

In Rt. 2013 page 588, NN had already been awarded victims of violence compensation, but this could not constitute a separate legal ground resulting to acquittal for the State in regard to liability for lack of fulfilling its obligations under the Convention.²⁵³ The Supreme Court did not decide upon the assessment of damages in Rt. 2013 page 588.²⁵⁴

People having suffered rape under Norwegian jurisdiction can apply for victims of violence compensation cf. §1 of the Victims of Violence Compensation Act of 20 March 2001. However, there is a primary condition that the person applying for compensation must have suffered a criminal offence – “straffbar handling” cf. Victims of Violence Compensation Act §§ 1 and 3.²⁵⁵ People subject to non-consensual sexual activity has therefore de facto been precluded from applying and receiving Victims of Violence Compensation and thus suffered a financial loss. The state of Norway can be held liable for this financial loss. See in similar direction Rt. 2005 page 1365 (Finnanger II) where the State of Norway was held liable for the financial loss the plaintiff had suffered due to an incorrect incorporation of an

²⁵² See also *M.C v. Bulgaria* (154, 166), Andenæs, Bjørge (2011)

²⁵³ Rt. 2013 588 (64)

²⁵⁴ Rt. 2013 588 (64)

²⁵⁵ Voldsoffererstatningsloven §1 cf. § 3

EEC directive. As a result the State encouraged people subject to damage liability to set forth their claims.²⁵⁶

3.2.8 Summary and Conclusion

The member States' positive obligations under Articles 3 and 8 of the Convention require the penalization and effective prosecution of any non-consensual sexual act.²⁵⁷ As of today, the definition of rape in Section 192 of the GCPC does not penalize non-consensual sexual activity. A hearing has been made by the Norwegian Ministry of Justice and Public Security as to whether Section 192 of the GCPC should be expanded with an additional letter d penalizing non-consensual sexual activity as rape. The outcome of this hearing is still to be made. It has been claimed that ECHR mainly constitute rights for people accused for a crime,²⁵⁸ *M.C v. Bulgaria* proves that rights under the ECHR also apply to people who have suffered non-consensual sexual activity. The ECtHR defined a regional human rights standard in regard of the definition of rape in the case of *M.C v. Bulgaria*. The ECtHR reached this conclusion by analysing the definitions of rape held by a number of Member State Parties in their respective penal codes, and the penal codes of other countries around the world. A common denominator of penalising non-consensual sexual activity as rape was found by the ECtHR in the Recommendation of the Committee of Ministers of the Council of Europe on the protection of women against violence, the ICTY judgment of *Prosecutor v. Kunarac, Kovač and Vuković*, and General Recommendation No. 19 of 29 January 1992 on violence against women issued by the United Nations Committee on the Elimination of Discrimination against All Women Article 24. In other words, based on European political consensus, International Criminal Law, and the global Convention on the Elimination of All Forms of Discrimination against Women, the ECtHR concluded that the

²⁵⁶ <http://www.regjeringen.no/nb/dokumentarkiv/stoltenbergii/jd/Nyheterogpressemeldinger/nyheter/2006/kra-v-mot-staten-finnanger-ii.html?id=100272>

²⁵⁷ *M.C v. Bulgaria* (171 cf. 95, 130- 147)

²⁵⁸ NOU 2008:4 p. 20 E-bok

Member State Parties under the regional European Convention on Human Rights has a positive obligation to penalise any non-consensual sexual activity.

The Member State Parties of the ECHR represents both the common law tradition and the continental law tradition. It can be claimed that the definition of rape held by common law countries won ground in the case of *M.C v. Bulgaria*. It can thus be said that due to the prevalence rule in Section 3 of the Human Rights Act, the Norwegian legislative and thus judicial branch is prohibited from using cultural and other policy considerations in their obligations to penalize non-consensual sexual activity as rape.²⁵⁹ In the realm of Norwegian criminal law, full realization of an individual's right to protection from a third-party's non-consensual violation of their sexual autonomy can only be achieved by changing or expanding statutory law. The legislative branch has thus an obligation to penalise non-consensual rape in order to achieve compliance with Articles 3 and 8 cf. *M.C v. Bulgaria* and Article 1 of the ECHR.²⁶⁰ The impact of supranational obligations in domestic legislation can thus de facto realize democratic rights for Norwegian citizens. This political responsibility can be seen as a result of a democratic process.²⁶¹ A potential perpetrator is secured foreseeability in regard to the punitive reaction that might threaten him, and protected against arbitrariness cf. the Constitution of Norway Articles 96 and 97, cf. Rt. 2009 page 780 and Rt. 2011 page 469. A person subject to non-consensual sexual activity is provided sufficient protection under the law as the matter is criminalized.

Norway has failed as a Member State Party of the ECHR to secure legal protection of individuals, having suffered non-consensual rape. Norway may therefore be liable for damage compensation towards individuals subject to non-consensual rape, as they have not been able to see perpetrators being brought to justice. The Supreme Court acknowledged in Rt. 2013 page 588 that the State of Norway can be held liable for damage compensation based

²⁵⁹ Ot.prp.nr.8. (2007-2008) p. 27- 31, Andenæs (2008), Rt. 2008 24

²⁶⁰ CN 1814 §§ 76-78, § 110 c

²⁶¹ Graver (2012) p. 100- 110, Sand (2005) p. 15-39

on non-performance of obligations under the ECHR. Damage liability for the State due to non-implementation of judgements is a general trend in Europe: "The situation in Europe is exceptional, featuring, despite some resistance, a general trend towards empowerment of national courts to secure effective implementation of judgments of the European Court of Human Rights (ECtHR)."²⁶²

²⁶² Nollkaemper (2013) p. 9

3.3 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

3.3.1 Introduction

The Norwegian Parliament ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 21 May 1981.²⁶³ 187 States as of May 2014 ratified the Convention.²⁶⁴ The aim of CEDAW is to achieve “full equality between men and women,” in every aspect of life cf. the preamble of the Convention.²⁶⁵ Full equality between men and women is sought met through the elimination of all discrimination of women. “Law” cf. Article 2 of the Convention is one of these areas where the States Parties are obliged to seek equality between the sexes. Rape is not specifically mentioned, nor defined in the Convention itself. However, the primary responsible body for monitoring the Convention, the Committee on the Elimination of Discrimination against Women, has developed a definition of rape in the light of the Convention.

In the preparation of the Human Rights Act of 21 May 1999, the Ministry of Justice and Public Security suggested that CEDAW should not be incorporated into the Act.²⁶⁶ However the majority of the Standing Committee on Justice requested the Government at that time to present a proposition of incorporation of the Convention on the Rights of the Child (CRC), and CEDAW.²⁶⁷ CRC was incorporated into the Human Rights Act in 2003.²⁶⁸ Interestingly the CEDAW was first incorporated into the Act of Gender Equality²⁶⁹ in 2005.²⁷⁰ The Act of Gender Equality does not have a rule of precedence when conflict with

²⁶³ St.prp.nr.72 (1980-81), Innst. S. Nr. 196 (1980-1981)

²⁶⁴ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&lang=en

²⁶⁵ See also Ot.prp.nr. 93 (2008-2009), Innst.O.nr.115 (2008-2009)

²⁶⁶ NOU 1993:18, Ot.prp.nr.3 (1998-1999)

²⁶⁷ Innst.O.nr.51 (1998-1999)

²⁶⁸ See Lov av 1 August 2003 nr. 86

²⁶⁹ Lov av 9 Juni 1978 nr. 45

²⁷⁰ Lov av 10 Juni 2005 nr. 38

other provisions as the Human Rights Act does. The Parliament therefore asked the Government again on 12 May 2005, to consider incorporating CEDAW into the Human Rights Act. CEDAW was incorporated into the Human Rights Act by Act of 19 of June 2009 nr. 80 cf. § 2, about ten years after the Human Rights Act entered into force. The prolonging by the Parliament in giving CEDAW the same legal status as other human rights conventions in the Human Rights Act might be taken into an account of being a notion of cultural resistance in promoting the full elimination of discrimination of all women.²⁷¹ The improved domestic legal status of CEDAW shows nevertheless that Norway is willing to promote the human rights set out in CEDAW.

3.3.2 The weight of decisions, general comments and reports from the Committee on the Elimination of Discrimination against Women as a source of law in domestic Norwegian law

3.3.2.1 The Committee on the Elimination of Discrimination against Women

The report system for overseeing the realization of human rights in the Contracting States has been cited as a reason why human rights, even on an international level, “lacks teeth”.²⁷² In contrast to decisions from the ECtHR, decisions or reports from the UN Human Rights Committees are not legally binding for the Member State Parties. In general it has been claimed that there “are inevitably limitations to the jurisdiction of the Committees and the jurisprudence produced by them is incomparable to that of regional human rights courts as the European Court of Human Rights. Nevertheless, the importance of the Committees should not be underestimated.”²⁷³

²⁷¹ See Asbjørn Eides discussion on cultural resistance towards parts of the human rights system in Eide (2001) p. 11-12, and Hellum (2013) p. 588- 589

²⁷² Smith (2012) p. 154

²⁷³ Smith (2012) p. 67

The Committee on the Elimination of Discrimination against Women (the Committee) is established under Article 17 of the Convention with the purpose of considering the progress made in the implementation of CEDAW.²⁷⁴ The Committee's main purpose is to seek the equality of rights between men and women.²⁷⁵ The Committee is not a judicial body, but have competency to receive complaints from individuals or groups of individuals alleging violations of CEDAW cf. Article 2 of the Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women 1999. Norway signed the Optional Protocol on 10 December 1999 and ratified the Optional Protocol on 5 March 2002.²⁷⁶

Article 21 of CEDAW provides that the Committee can make general recommendations and suggestions based on the examination of reports and information received from the States Parties. Like the UN Committee on Economic, Social and Cultural Rights, the Committee may refer to one of the general comments as expressing the contents of a treaty obligation when issuing suggestions and recommendations to a particular State Party.²⁷⁷

In order to give effect to the convention, States Parties have agreed to submit periodic reports every four years on the "legislative, judicial, administrative or other measures which they have adopted" cf. Article 18 of the Convention.²⁷⁸ The Committee will make general observations on the report and invite the State to discuss particular Articles of the Convention before the Committee draws up its concluding observations which purpose is to give the State practical guidance on the implementation of the Convention.²⁷⁹

²⁷⁴ Smith (2012) p. 76-77

²⁷⁵ Smith (2012) p. 76-77

²⁷⁶ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

²⁷⁷ Scheinin (2001) p. 45.

²⁷⁸ See also Smith (2012) p. 77.

²⁷⁹ Smith (2012) p. 78.

3.3.2.2 The weight and impact of decisions, general comments and reports from the Committee on the Elimination of Discrimination against Women in Norway

The weight and impact of the decisions and reports from the Human Rights Committees was discussed in the preparatory works of the Human Rights Act.²⁸⁰ It was held that there are no international obligations prescribed through any of the Conventions, nor the Vienna-Convention on the Law of the Treaties, that such statements should be followed.²⁸¹ However, the preparatory committee held that there had to be put a distinction between statements in regard to a specific state, and the weight such statements has towards other states that are obligated to the Convention.²⁸² Even though there is a fundamental distinction between the legally binding decisions of the ECtHR for the Member State Parties, and the reports and decisions from the UN Human Rights Committees concerning the Member State Parties, it was held that the practical consequences does not necessarily need to be too large.²⁸³ This was due to that Member Parties customarily adjusts to decisions performed by the UN Committees, and that there are no other reactions to enforce a State's responsibility after the ECHR other than exclusion of the State from the Council of Europe.²⁸⁴ In regard to the weight of decisions and reports in cases where there is another Member State Party of concern, the preparatory committee held that there often will be evident to follow the Committee's practice, because it is through the Committee's practice general principles of the Convention are being developed, and given a specific content.²⁸⁵ The preparatory committee concluded that the Convention Organ's interpretation of the Conventions would be a source of law of considerable weight.²⁸⁶

²⁸⁰ NOU 1993:18 p. 88.

²⁸¹ NOU 1993:18 p. 88.

²⁸² NOU 1993:18 p. 88.

²⁸³ This has been contended by Ulfstein (2012) p. 552-570

²⁸⁴ NOU 1993:18 p. 88, see also Rt. 2008 1764 (77).

²⁸⁵ NOU 1993:18 p. 88.

²⁸⁶ NOU 1993:18 p. 88.

Reports, general recommendations and decisions in individual cases from the Committee was described by the Supreme Court of Norway in Rt. 2008 page 1764 as a source of law of “significant weight” for the interpretation of a Human Rights Convention.²⁸⁷ The question of what impact the Human Rights Committee’s interpretation of the International Covenant on Civil and Political Rights (ICCPR) should have in regard to domestic Norwegian law, was formulated as a question of what weight the Committee’s interpretation should have as a source of law in domestic law for domestic law-practitioners when interpreting the Convention.²⁸⁸ The Court held that in regard to the principles for interpretation of the usage of the preceding rule in Section 3 of the Human Rights Act in relation to domestic statutory law and the ECHR, the guidelines for interpretation having been drawn out by the Supreme Court, would also be valid in regard to the ICCPR and Norwegian law. The ICCPR is incorporated through the Human Rights Act Section 2 nr. 3 and is therefore a part of domestic law. The question before the Supreme Court was whether a decision denying an appeal grounded in the domestic Criminal Procedural Code Section 231 subsection two, first comma, where there was not given any reasons for the denial, other than what the Criminal Procedural Code demanded that it was clear the appeal would not succeed, was in conflict with ICCPR Article 14 nr. 5. The Human Rights Committee had in many decisions held that using the method of “leave to appeal” was to be seen as a way to review the conviction by a higher tribunal in accordance with SP Article 14 nr. 5. The Supreme Court in Grand Chamber ruled that all decisions in regard to refuse an appeal should be reasoned based on ICCPR Article 14 nr. 5, Communication No. 662/1995 Lumley v. Jamaica section 7.3, the decision of July 17 2008 from the Human Rights Committee, and the Committee’s General Comment No. 32 from 2007 on page 11-12.²⁸⁹

²⁸⁷ Rt. 2008 1764 (73-81)

²⁸⁸ Rt. 2008 1764 (75)

²⁸⁹ Rt. 2008 1764 (118)

Reports to a specific country, in this case Norway, and decisions in individual cases from the Committee towards Norway might have more weight as a source of law in domestic law.²⁹⁰

In light of the above, the incorporation of CEDAW into the Human Rights Act gives decisions from the Committee on the Elimination of Discrimination against Women, its general Comments, and reports “significant weight” as a source of law in Norway.²⁹¹

3.3.2.3 Summary and Conclusion

The preparatory works of the Human Rights Act underlined that the incorporation of the Human Rights Conventions into Section 2 of the Human Rights Act would lead to a new legal situation with the superior aim of strengthening the legal standing of individuals in domestic law.²⁹² The intended result was that Norwegian case law in as large extent as possible is to correspond with what is to be considered the current international legal interpretation.²⁹³ The Supreme Court of Norway approved of these views in Rt. 2008 page 1764 and stated that an interpretation of a Convention by a UN Human Rights Committee has “significant weight” as a source of law.²⁹⁴ The implementation of CEDAW into the Human Rights Act Section 2 cf. the preceding rule in Section 3, implicates therefore that CEDAW has been given “teeth” based on the consensus of the State Party and the teleological interpretation and development of the rights derived from CEDAW by the Committee. Time will show if this cooperation constitutes fine dentistry worthy of any Colgate smile in securing the elimination of all discrimination of women.

²⁹⁰ See in this direction Rt. 2009 1261 (41-42)

²⁹¹ NOU 1993:18 p. 88 cf. Rt. 2008 1764, Rt. 2009 1261 (41-42)

²⁹² Innst.O. nr. 51 (1998-1999) p. 6

²⁹³ Innst.O. nr. 51 (1998-1999) p. 6

²⁹⁴ Rt. 2008 1764 (81)

3.3.3 The constituent elements of rape as defined by the Committee on the Elimination of Discrimination against Women interpreted in the light of CEDAW

3.3.3.1 Introduction

Under section "Violence against women", in the Eight Periodic Report of Norway, the Committee of CEDAW urged Norway to: "Adopt a legal definition of rape in the Penal Code so as to place the lack of consent at its centre, in line with the Committee's general recommendation No. 19, and the Vertido case."²⁹⁵ This can be seen as a specific provision under CEDAW and thus a positive obligation for Norway to undertake cf. the Human Rights Act Section 3, Rt. 2008 page 1764 and Rt. 2009 page 1261.²⁹⁶

3.3.3.2 A legal definition of rape in the GCPC so as to place the lack of consent at its centre, in line with the Committee's general recommendation No. 19

The Committee interpreted gender-based violence to be entailed in the definition of discrimination in article 1 of CEDAW in General Recommendation No. 19 "General Comments," in 1992.²⁹⁷ Violence directed against a woman because she is a woman or that affects women disproportionately is gender-based violence.²⁹⁸ "Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence."²⁹⁹

Further, "discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f), and 5.) For example, under article 2 (e), the Conven-

²⁹⁵ CEDAW/C/NOR/8 p. 6 E-bok, Rt. 2009 1261 (44)

²⁹⁶ See also Merry (2001) concerning state responsibility for failures to protect women from violence, the obligation to protect being an internationally recognized human right p. 86-92

²⁹⁷ General recommendations No. 19 nr. 9 E-Bok

²⁹⁸ General recommendations No. 19 nr. 9 E-Bok

²⁹⁹ General recommendations No. 19

tion calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”³⁰⁰

24. (b) “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give *adequate protection* to all women, and respect their integrity and dignity.”³⁰¹ (emphasis added)

“(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace”³⁰²

3.3.3.2.1 Conclusion

Norway has a positive obligation under CEDAW to give adequate protection to women being subject to gender-based sexual violence by any person within Norway’s jurisdiction. This positive obligation in regard of rape, involves that laws against rape shall give adequate protection to all women, and respect their integrity and dignity. These laws shall

³⁰⁰ General recommendations No. 19 nr. 9 E-Bok

³⁰¹ General recommendations No. 19

³⁰² General recommendations No. 19 nr. 24 t-i E-Bok

bring effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.

3.3.3.3 A legal definition of rape in the GCPC so as to place lack of consent at its centre, in line with the case of *Vertido v. the Philippines*³⁰³

In the case of *Vertido v. the Philippines*, Karen Vertido, a Filipino national claimed to be a victim of discrimination against women within the meaning of Article 1 of the Convention in relation to the general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women. Ms. Vertido argued that the acquittal of the man accused for raping her was “grounded in gender-based myths and misconceptions about rape and rape victims, and that it was rendered in bad faith, without basis in law or in fact.”³⁰⁴ She also claimed that her rights under articles 2 (c), (d), (f) and 5 (a) of CEDAW had been violated by the State party.³⁰⁵

Article 1 of CEDAW entails a general definition of discrimination against women:

Art. 1. ”For the purposes of the present Convention, the term ”discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms, in the political, economic, social, cultural, civil or any other field.”

³⁰³ The Committee’s definition of rape has also been upheld in the *Case of SVP v. Bulgaria*

³⁰⁴ *Vertido v. the Philippines* p. 5

³⁰⁵ *Vertido v. the Philippines* p. 2

Karen Vertido was raped by a colleague, J.B.C., on the night of 29 March 1996.³⁰⁶ The Regional Court of Davao City acquitted the colleague on 26 of April 2005. Three principles derived from previous case law from the Supreme Court was dismissive:

- (a) “it is easy to make an accusation of rape; it is difficult to prove but more difficult for the person accused, though innocent, to disprove;
- (b) in view of the intrinsic nature of the crime of rape, in which only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution;
- (c) the evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence of the defense.”³⁰⁷

Ms. Vertido alleged that the guiding principles from the Supreme Court of the Philippines, followed by the judge in deciding her case, would involve “that an accusation of rape is not easy to make and that to say that a rape charge is more difficult for the accused to disprove is unwarranted. (...) this presumption unjustifiably and immediately places rape victims under suspicion.”³⁰⁸

The Regional Court of Davao City had challenged the credibility of Ms. Vertido’s testimony.

“[S]hould the author really have fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties.”³⁰⁹

³⁰⁶ *Vertido v. the Philippines* p. 3

³⁰⁷ *Vertido v. the Philippines* p. 4

³⁰⁸ *Vertido v. the Philippines* p. 7

³⁰⁹ *Vertido v. the Philippines* p. 4-5

The Court found that the testimony of other witnesses, the motel room boy and the friend of the accused, corroborated the testimony of the accused on some material points. The Court therefore concluded that the evidence presented by the prosecution, in particular the testimony of the complainant herself, left too many doubts in the mind of the Court to achieve the moral certainty necessary to merit a conviction. Applying guiding principles derived from other case law in deciding rape cases, the Court declared itself unconvinced that there existed sufficient evidence to erase all reasonable doubts that the accused committed the offence with which he was charged, and acquitted him.³¹⁰

Karen Vertido claimed that the Philippines had failed to comply with their positive obligations in Article 2 *litra* c, d, and f, of CEDAW, because of J.B.C.'s acquittal.³¹¹

Article 2 *litra* c, d, and f of CEDAW read:

Art. 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, to this end, undertake:

- c) To establish legal protection of the rights of women on a equal basis with men and to ensure that public authorities and institutions shall act in conformity with this obligation;
- d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

³¹⁰ *Vertido v. the Philippines* p. 4-5

³¹¹ *Vertido v. the Philippines* p. 5

- f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;³¹²

Ms. Vertido also alleged that the acquittal was grounded in gender-based myths and misconceptions about rape and rape victims in violation of article 5 (a) of the Convention.³¹³

Art. 5. States Parties shall take all appropriate measures:

- a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;³¹⁴

A myth and stereotype challenged by Karen Vertido to the Committee was

“to conclude that a rape occurred by means of threat, there must be clear evidence of a direct threat. (...) instead of employing a context-sensitive assessment of the evidence and looking at the circumstances as a whole, the Court focused on the lack of the objective existence of a gun. (...) according to case law and legal theory, it is the lack of consent, not the element of force, that is seen as the constituent element of the offence of rape. (...) requiring proof of physical force or the threat of physical force in all circumstances risks leaving certain types of rape unpunished and jeopardizes efforts to effectively protect women from sexual violence.”³¹⁵

³¹² CEDAW

³¹³ *Vertido v. the Philippines* p. 5

³¹⁴ CEDAW

³¹⁵ *Vertido v. the Philippines* p. 6

Ms. Vertido further alleged that “the fact that the accused and the victim are “more than nodding acquaintances” makes the sex consensual constitutes a fourth myth and stereotype. (...) it is a grave misconception that any relationship between the accused and the victim is valid proof of the victim’s consent to the sexual act.”

Ms. Vertido claimed that “the Court unjustly imposes a standard of “normal” or “natural” behaviour on rape victims and discriminates against those who do not conform to these standards.”³¹⁶ Ms. Vertido claimed that her case was not an isolated one and that there were many trial court decisions in rape cases “that discriminate against women and perpetuate discriminatory beliefs about rape victims. (...) those insidious judgements violate the rights and freedoms of women, deny them equal protection under the law, deprive them of a just and effective remedy for the harm they suffered and continue to force them into a position subordinate to men.”³¹⁷

In order to support her accusations, Ms. Vertido presented examples from seven decisions of trial courts from 1999 to 2007 as an illustration of the systematic discrimination rape victims experience when they seek redress. The following similarities with her case was pointed out:

- (a) The “sweetheart defence” or a variation thereof, by which it is asserted that the sexual act is consensual because intimate or sexual relations existed or exist between the complainant and the accused;
- (b) The Court’s appreciation of the complainant’s conduct before, during and after the alleged rape, with the main line of reasoning being that the complainant did not exhibit the “natural” reaction of a woman who claims to have been violated;
- (c) The absence of injury, on the part of both the accused and the complainant;

³¹⁶ *Vertido v. the Philippines* p. 6

³¹⁷ *Vertido v. the Philippines* p. 8 nr. 3.8

- (d) The nature, amount or severity, and the perceived effects of the force, threat or intimidation as applied to the complainant;
- (e) The understanding of the concept of consent and how it is manifested or communicated.”³¹⁸

The Committee reviewed Mrs. Vertido’s allegations under Articles 2 (c), 2 (f), and 5 (a) of the Convention.³¹⁹ The Committee reached the conclusion that Mrs. Vertido rights under the Convention had been violated and thus constituted a breach of the corresponding State Party’s obligations to end discrimination in the legal process.³²⁰

In regard to stereotyped myths created by the judiciary and the States Parties obligation to modify or abolish existing laws that constitute discrimination, the Committee held that:

“the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions which violate the provisions of the Convention. It notes that by articles 2 (f) and 5 (a), the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.”³²¹

³¹⁸ *Vertido v. the Philippines* p. 8 nr. 3.8.

³¹⁹ *Vertido v. the Philippines* p. 14 nr. 8.2

³²⁰ *Vertido v. the Philippines* p. 17 nr. 8.9

³²¹ *Vertido v. the Philippines* p. 14-15 nr. 8.4.

Reiterating General Recommendation No. 19, the Committee held that in “the particular case, the compliance of the State party’s due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author’s case.”³²²

The Committee found that it “is clear from the judgment that the assessment of the credibility of the author’s version of events was influenced by a number of stereotypes”.³²³ Even though a legal precedent was established by the Supreme Court of the Philippines that “it is not necessary to establish that the accused had overcome the victim’s physical resistance in order to prove lack of consent,”³²⁴ the Committee found that to expect Mrs. Vertido to resist in the situation at stake, reinforced in a “particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.”³²⁵

At the time this case was pending before the Committee on 22 September 2010,³²⁶ the definition of rape in the Revised Penal Code of the Philippines Article 233-A read:

“Rape: When And How Committed.

Rape is committed:

1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:
 - (a) Through force, threat, or intimidation;

³²² *Vertido v. the Philippines* p. 14-15 nr. 8.4.

³²³ *Vertido v. the Philippines* p. 15 nr. 8.5.

³²⁴ *Vertido v. the Philippines* p. 16 nr. 8.2.

³²⁵ *Vertido v. the Philippines* p. 14 nr. 8.2.

³²⁶ *Vertido v. the Philippines* p. 1

- (b) When the offended party is deprived of reason or otherwise unconscious;
 - (c) By means of fraudulent machination or grave abuse of authority; and
 - (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.
2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.³²⁷

In regard of the definition of rape, the Committee noted that:

*“lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code. It recalls its general recommendation No.19 of 29 January 1992 on violence against women, where it made clear, in paragraph 24 (b), that “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women and respect their integrity and dignity.” Though its consideration of States parties’ reports, the Committee has clarified time and again that rape constitutes a violation of women’s right to personal security and bodily integrity, and that its essential element was lack of consent.”*³²⁸ (emphasis added)

The Committee concluded that it “is of the view that the State party has failed to fulfill its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and

³²⁷ *Vertido v. the Philippines* p. 16 footnote under nr. 8.7.

³²⁸ *Vertido v. the Philippines* p. 16 nr. 8.7.

article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No.19 of the Committee”.³²⁹

As a result, the Committee gave the Philippines a general recommendation to review “the definition of rape in the legislation so as to place lack of consent at its centre.”³³⁰ This involved the removal of “any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimization of secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

- a. Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
- b. Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances;”³³¹

3.3.3.4 Summary and Conclusion

The constituent element of rape as defined by the Committee on the Elimination of Discrimination against Women, interpreted in the light of CEDAW is lack of consent. In order to provide adequate protection for women subject to gender-based violence, Norway’s positive obligation under CEDAW is to revise the definition of rape, and to place lack of consent at its centre, in line with the Committee’s general recommendation No. 19 and the *Vertido case*. This positive obligation involves the removal of any requirement in legislation that sexual assault be committed by force or violence. The State Party is obliged to minimize secondary victimization of the complainant in proceedings by enacting a definition of

³²⁹ *Vertido v. the Philippines* p. 17 nr. 8.9.

³³⁰ *Vertido v. the Philippines* p. 17 nr. 8.9. (b) (i)

³³¹ *Vertido v. the Philippines* p. 17 nr. 8.9.

sexual assault that either requires the existence of “unequivocal and voluntary agreement”, or requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.”³³²

3.3.4 Conflicting provisions between CEDAW and the definition of rape in Section 192 of the GCPC cf. the Human Rights Act Section 3

3.3.4.1 Obligation to place lack of consent as the centre of the definition of rape

CEDAW is a Convention incorporated into Section 2 of the Human Rights Act, and shall therefore “take precedence over any other legislative provisions that conflict with them” cf. Section 3.³³³ The State Parties of CEDAW “undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention,” cf. Article 24. The Supreme Court of Norway stated in Rt. 2008 page 1764 that an interpretation of a Convention by a UN Human Rights Committee have significant weight as a source of law.³³⁴ The positive obligation of Norway under CEDAW is to place lack of consent at its centre as the definition of rape, in order to avoid continued discrimination of women.³³⁵ This implies that the current definition of rape in the Section 192 of the GCPC is not in compliance with CEDAW. As of today, Section 192 is very similar to the definition of rape in the Revised Penal Code of the Philippines Article 233-A, of which the Committee recommended revised in order to avoid continued discrimination of women.³³⁶

The Norwegian Ministry of Justice and Public Security finished an official hearing on June 1 2013, suggesting criminalising “lack of consent” to the sexual activity as rape by adding

³³² *Vertido v. the Philippines* p. 17 nr. 8.9.

³³³ GCPC 1902

³³⁴ Rt. 2008 1764 (81), See also Rt. 2009 1261 (44)

³³⁵ CEDAW/C/NOR/8 p. 6 E-bok

³³⁶ *Vertido v. the Philippines* p. 17 nr. 8.9. (b) (i)

an additional letter d to Section 192 of the GCPC.³³⁷ The purpose behind posing a proposition of expanding the definition of rape in Section 192 was to include a “rest- category” of cases where the sexual activity has been non-consensual.³³⁸ This proposal of expanding the definition of rape came as a consequence of the Committee’s Eight Periodic Report of Norway,³³⁹ and Norway’s Signature of the Istanbul Convention. Norway is obliged to adopt the definition of rape held by the Committee in “good faith.”³⁴⁰ And a “party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³⁴¹

In the realm of criminal law, Article 96 and 97 of the Constitution, and the Supreme Court of Norway’s strict interpretation of the principle of legality will draw lines for the ‘justiciability’³⁴² of the rights derived from CEDAW. In order to prosecute people for a crime in Norway, the crime has to be prescribed by statutory law. Rape as defined by the Committee will therefore not constitute an independent legal ground for holding anyone liable for rape in Norway. Rather, the Report will constitute a political pressure on the Government and Parliament of Norway to place lack of consent as the constituent element of rape.

3.3.4.2 Summary and Conclusion

It can be claimed that the State of Norway has given the Committee direct opportunity to constitute positive obligations under CEDAW for women subject to discrimination in Norway; in whatever area the Committee may choose under the Convention. The incorporation of CEDAW into the Human Rights Act,³⁴³ the legal status of “significant weight”³⁴⁴ of the

³³⁷ Høringsnotat p. 22-34 E-bok

³³⁸ Høringsnotat p. 5-6 E-bok

³³⁹ CEDAW/C/NOR/8 p. 6 E-bok

³⁴⁰ Vienna Convention Article 26

³⁴¹ Vienna Convention Article 27

³⁴² See Scheinin (2001) p. 29

³⁴³ Innst.O. nr. 51 (1998-1999) p. 6

UN Committee's interpretation of the Convention, and the "signal effect"³⁴⁵ of Article 110 c of the Constitution to the lawgiver of respecting and ensuring human rights, gives the State of Norway no margin of appreciation when it comes to the positive obligation Norway has undertaken to adopt a legal definition of rape in its Penal Code so as to place the lack of consent at its centre.

3.3.5 Failure to place lack of consent at its centre as the definition of rape might contribute to a continuation of discrimination of women in law and practice

The current definition of rape in Section 192 of the GCPC holds anyone liable for sexual activity caused by "means of violence or threats"³⁴⁶ or if a person "engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act." This definition of rape might contribute to an assumption "in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence."³⁴⁷ By placing lack of consent at the centre as the definition of rape it is therefore understood that the constitute element of rape is lack of consent to the sexual activity, not the requirement of the use of "violence," "threats", or that the aggrieved party is "unconscious" or "incapable for any other reason of resisting the act". These listings simply point to the constituent element of rape that it is non-consensual. In fact, not placing lack of consent as the constitute element of rape can result to continued discrimination of women.

The Committee noted in the case of *Vertido v. the Philippines* that the Convention places obligations on all State organs, and that States parties can be responsible for judicial decisions, which violate the provisions of the Convention.³⁴⁸ By articles 2 (f) and 5 (a), the

³⁴⁴ Rt. 2008 1764

³⁴⁵ NOU 1993:18 p. 156-161 E-bok

³⁴⁶ GCPC 1902 p. 76 E-bok

³⁴⁷ *Vertido v. the Philippines* p. 14 nr. 8.2.

³⁴⁸ *Vertido v. the Philippines* p. 14-15 nr. 8.4.

State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women.³⁴⁹ The Committee held in the *Vertido case* that the ruling by the Philippine Court reinforced in a “particular manner the myth that women must physically resist the sexual assault.”³⁵⁰ The Committee therefore stressed that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.”³⁵¹

Criminalizing a “rest-category” of non-consensual sexual activity as rape might contribute to a continued discrimination in Norwegian law and practice. Rt. 2003 page 687 can here serve as an example.³⁵² The man was accused of rape for continuing sexual activity with a woman who fell asleep during the sexual activity and was therefore per definition “unconscious” cf. Section 192 b. The Court stated that the facts of the case could be subsumed under Section 192 litra b, and a consequence of not doing so would lead to that the aggrieved party would not have legal protection for any given time if that person should choose consciously to engage or not engage in sexual activity. Yet it was a question of using very serious statutory sections towards that what the lawgiver defines as rape - a crime punishable with up to ten years in prison as this current case was a case where the sexual activity was not intercourse. The situation in Rt. 2003 page 687 was in the Court’s opinion so different from those cases sections concerning rape is supposed to entail, and of which has usually been deemed as rape. At the same time this current situation was not an impractical one, neither in established relationships, nor in youth groups as was of the current case: a couple starts sexual activities that is mutually consented, but the one person falls asleep, due to intoxication or tiredness, without the other stopping the sexual activity. Due

³⁴⁹ *Vertido v. the Philippines* p. 14-15 nr. 8.4.

³⁵⁰ *Vertido v. the Philippines* p. 14 nr. 8.2.

³⁵¹ *Vertido v. the Philippines* p. 14 nr. 8.2.

³⁵² See previous analysis in chapter 2, 2.1.3.2.

to policy considerations and consideration of the consequences of the statutory interpretation, the Supreme Court acquitted the man.³⁵³

Like Karen Vertido, the 20-year old woman in Rt. 2003 page 687 is likely to have been subject to discrimination against women within the meaning of Article 1 of CEDAW, constituting a breach of the corresponding State Party's obligations to end discrimination in the legal process under Articles 2 (c), 2 (f), and 5 (a) of the Convention,³⁵⁴ and in relation to the general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women, and the *Vertido case*. Ms. Vertido had argued that the acquittal of the man accused for raping her was "grounded in gender-based myths and misconceptions about rape and rape victims, and that it was rendered in bad faith, without basis in law or in fact."³⁵⁵ The acquittal of the 24-year-old man in Rt. 2003 page 687 was neither based in statutory law cf. Section 192 b of the GCPC, nor the facts of the case as they could be subsumed under Section 192 b. The well-known principle prescribed by statutory law in the GCPC Section 40 paragraph one, third comma; "if the offender has acted in a self-induced state of intoxication caused by alcohol or other means, the court shall disregard such intoxication when judging whether the act was wilful,"³⁵⁶ was disregarded. This principle is further underlined in Section 45 of the GCPC; "Unconsciousness that is a consequence of self-induced intoxication (caused by alcohol or other means) shall not exclude punishment."³⁵⁷ The 24-year-old man was intoxicated by alcohol and amphetamine at the time he engaged in the sexual activity with the aggrieved party.³⁵⁸ The aggrieved party was also intoxicated by alcohol, and had smoked some weed before she consented to the sexual activity, and before she fell asleep. It is interesting that these well known principles, prescribed by statutory law, was not taken into account in this case. The 20-year-old woman consented to the

³⁵³ Rt. 2003 687 (13-19)

³⁵⁴ *Vertido v. the Philippines* p. 14 nr. 8.2

³⁵⁵ *Vertido v. the Philippines* p. 5

³⁵⁶ GCPC 1902 p. 25 E-bok

³⁵⁷ GCPC 1902 p. 26 E-bok

³⁵⁸ Rt. 2003 687

sexual activity in a state of consciousness. What she did not consent to was the sexual activity while being asleep.

A report from the Norwegian Director General of Public Prosecution from 2007 concluded that myths and misconceptions in regard of rape could influence the outcome of a criminal case. It found that members of the Police and the Prosecution shared the view of these myths and misconceptions, at least in such a substantial amount that it was described as a problem.³⁵⁹ The conditions for sexual activity being deemed as rape according to Section 192 of the GCPC such as “violence”, “threats”, “unconscious” or “incapable of resisting the act” were often factors contributing to create reasonable doubt as to whether the sexual activity was consensual, resulting in the acquittal of the accused when he claimed that the sexual activity had been consensual.³⁶⁰ Concerning the quality of prosecutorial decisions ending with acquittals, three common features were found.³⁶¹ First, most of the victims/perpetrators knew each other before the crime was committed. Secondly the scene of crime was often the victim’s, the suspect or their common house. Third, the suspect seldom denied that sexual activity had occurred, however the suspect claimed that it had been of one’s own free will.³⁶² Low prosecution rate, and high acquittal rate were some of the similar problems in Sweden and Denmark.³⁶³ Interestingly both Denmark and Sweden have similar definitions of rape in their respective penal codes as that of Norway.³⁶⁴

The current definition of rape in Section 192 has remained unchanged since the year of 2000. An Official Norwegian Report (NOU) from 2008 “From word to action” concerning rape estimated that only 1 % of all perpetrators are convicted for their crime.³⁶⁵ A con-

³⁵⁹ Rapport nr. 1/2007 p. 6

³⁶⁰ Rapport nr. 1/2007 p. 5.

³⁶¹ Rapport nr. 1/2007 p. 5.

³⁶² Rapport nr. 1/2007 p. 5.

³⁶³ Rapport nr. 1/2007 p. 4.

³⁶⁴ Brottsbalken 2.del. kap. 6. § 1, Straffeloven § 216, see also Rapport nr. 1/2007 p. 19-21

³⁶⁵ NOU 2008:4 p.1 E-bok

servative estimate stated that 8 000- 16 000 people were raped every year.³⁶⁶ The acquittal-rate of people prosecuted for rape was estimated to be three times as high compared to other criminal-offenses.³⁶⁷ The NOU stated that CEDAW had criticized Norway for its low conviction rate of reported rapes.³⁶⁸ Amongst the prepositions for change and improvement of the rule of law and legal status of victims of rape, the definition of rape in the GCPC was not taken into consideration as to whether it should be revised.³⁶⁹

The Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS) published a prevalence study on 25 February 2014, report 1/2014, concerning violence and rape in Norway. The analysis was performed in the light of the current definition of rape in Section 192 of the GCPC.³⁷⁰ The NKVTS found that only 3,5 % of the women being raped had experienced that their perpetrator had been convicted for their crime.³⁷¹ In regard to the experience with the court system, it was found that only a small minority of rape cases, in total 17,5% were known to the police. “The proportion of cases known to the police was somewhat higher for severe physical violence.”³⁷² Altogether two women had received compensation from the person who had raped them, and one person had applied for victim of violence compensation and received it.³⁷³ 86 % of the women questioned reported that someone they knew had raped them.³⁷⁴ The prevalence of lifetime rape was 9,4 % in women and 1,1, % in men.³⁷⁵ The report found that perpetrators of sexual assault against women

³⁶⁶ NOU 2008:4 p. 12

³⁶⁷ NOU 2008:4 p. 1 E-bok

³⁶⁸ NOU 2008:4 p. 1 E-bok

³⁶⁹ NOU 2008:4 p. 12-17 E-bok

³⁷⁰ Thoresen, Hjemdal (2014) p. 32

³⁷¹ Thoresen, Hjemdal (2014) p. 101, 106

³⁷² Thoresen, Hjemdal (2014) p. 26

³⁷³ Thoresen, Hjemdal (2014) p. 101

³⁷⁴ Thoresen, Hjemdal (2014) p. 107

³⁷⁵ Thoresen, Hjemdal (2014) p. 21

were almost exclusively male.³⁷⁶ In fact, the perpetrator of rape was most often a friend, an acquaintance, a neighbour, a colleague, or a current or previous romantic partner. The report concluded that severe physical violence and sexual abuse are prevalent in the Norwegian population, and often occur for the first time at an early age. The data did not indicate any reduction over time of rape against young women. However, physical violence and rape varied with socioeconomic factors. Physical violence and rape were found to be associated with mental health problems, and constitute serious public health problems.³⁷⁷ The report concluded that

“[p]hysical violence and sexual abuse are probably more important for women’s health, because women are exposed to heavier burden of violence and abuse than are men. (...) Rape and physical violence are still hidden. Few seek medical attention, few report the case to the police, and some never tell anyone.”³⁷⁸

The report has already been criticized by Amnesty International for not taking into account rapes that occurs when the aggrieved party has been asleep, which makes it likely to conclude that more than 1 out of 10 women have experienced rape during their lifetime in Norway.³⁷⁹ Siri Thoresen, one of the leaders of the study agreed that this most likely has led to an underestimate of the total numbers of people being raped in Norway.³⁸⁰ The report gave Norwegian media a notion to state that Norway is under a permanent rape-crisis, unlike any civilized nation.³⁸¹

The almost non-existing security under the rule of law for women subject to rape in Norway indicates that Norway has failed to provide women subject to rape adequate protec-

³⁷⁶ Thoresen, Hjemdal (2014) p. 22

³⁷⁷ Thoresen, Hjemdal (2014) p. 26-27

³⁷⁸ Thoresen, Hjemdal (2014) p. 26-27

³⁷⁹ <http://www.nrk.no/norge/mener-det-er-enda-flere-voldtekter-1.11576788>

³⁸⁰ <http://www.nrk.no/norge/mener-det-er-enda-flere-voldtekter-1.11576788>

³⁸¹ <http://www.dagbladet.no/2014/02/28/kultur/meninger/kronikk/voldtekt/vold/32079782/>

tion. One might claim that Section 192 is de facto merely symbolic,³⁸² leaving the criminal proceedings devoid of meaning.

3.3.6 Summary and Conclusion

The positive obligations under CEDAW of the State of Norway is to “adopt a legal definition of rape in the Penal Code so as to place the lack of consent at its centre, in line with the Committee’s general recommendation No. 19, and the *Vertido* case.”³⁸³ The Committee has defined rape through a teleological interpretation of the evolutionary rights set out in CEDAW, cf. the Committee’s General Recommendation No. 19, the *Vertido* case, specified as a progressive right and minimum standard in the Eight Periodic Report of Norway.³⁸⁴ The Committee’s recommendation of adopting a legal definition of rape in the GCPC as to place the lack of consent at its centre, can be seen as a specific provision for Norway in regard to the State’s positive obligations under CEDAW. The development of preventing discrimination of women subject to non-consensual rape is only limited by the general will of the State of Norway as the fulfilment of this legal protection of women depends on the consensus of the State.³⁸⁵

The current definition of rape in Section 192 of the GCPC might contribute to an assumption “in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.”³⁸⁶ Placing lack of consent at the centre of rape removes the consideration of the existing circumstances, as the crime is simply defined by the fact whether the sexual activity was consensual or not. Other non-consensual factors, which

³⁸² See Mathiesen (2011) p. 73-75

³⁸³ CEDAW/C/NOR/8 p. 6 E-bok

³⁸⁴ See comments in regard to “progressive rights,” “lack of specificity” and teleological interpretation in Smith (2012) p. 181

³⁸⁵ Smith (2012) p. 182

³⁸⁶ *Vertido v. the Philippines* p. 14 nr. 8.2.

constitute the crime of rape in Section 192 of the GCPC as it stands today, should rather be factors increasing the punitive reaction towards the perpetrator.

3.4 Summary and Conclusion

The ECtHR and the Committee of CEDAW define lack of consent as the constituent element of rape. There are currently conflicting provisions between the definition of rape in Section 192 of the GCPC, the ECHR and CEDAW. In the realm of criminal law, Norwegian Courts are prevented from interpreting criminal liability expansively from provisions that is not prescribed by statutory law cf. Article 96 of the Constitution and Rt. 2009 p.780, Rt. 2011 p. 469, and Rt. 2010 p. 1445. Compliance with the international obligations of Norway can therefore only be ensured by the expansion or revision of the definition of rape in Section 192 of the GCPC. The ECtHR stated in the case of *M.C v. Bulgaria*, “the member State’s positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non- consensual sexual act, including in the absence of physical resistance by the victim.”³⁸⁷ The effectiveness of the system put in place by the State in accordance with its international obligations shall not leave the criminal proceedings in the case devoid of meaning cf. Article 8 and the case of *C.A.S and C.S v. Romania*. The positive obligation of Norway under CEDAW is to adopt a legal definition of rape in the Penal Code so as to place the lack of consent at its centre, in line with the Committee’s general recommendation No. 19, and the *Vertido case*.

Norway has a positive obligation under the ECHR to penalise any non-consensual sexual act.³⁸⁸ An obligation of which the proposal of adding an additional letter d to Section 192 of the GCPC, criminalising “lack of consent” to the sexual activity as rape seems sufficient.³⁸⁹ However, a legal definition of rape in the Penal Code so as to place lack of consent at its centre, in line with the Committee’s general recommendation No. 19, and the

³⁸⁷ *M.C v. Bulgaria* (164-166)

³⁸⁸ *M.C v. Bulgaria*

³⁸⁹ Høringsnotat p. 22-34 E-bok

Vertido case interpreted in “good faith”³⁹⁰ suggest that this legislative proposal is insufficient. In order to avoid continued discrimination of women in law and practice, revising the definition of rape in Section 192 entirely so as to place lack of consent at its centre is required.

³⁹⁰ Vienna Convention Article 26

4 International Criminal Law: Lack of Consent as the Constituent Element of Rape?

4.1 Rape as crimes against humanity and war crimes in chapter 16 of the Norwegian Penal Code of 2005

4.1.1 Introduction

Genocide, crimes against humanity and war crimes were implemented as statutory provisions in the Norwegian Penal Code of 2005 (NPC).³⁹¹ The new Penal Code (NPC) is estimated to enter into force by 2017.³⁹² Chapter 16 of the NPC concerning genocide, crimes against humanity and war crimes entered into force by resolution of 7 March 2008 nr. 225 cf. § 401.³⁹³ The specified provisions in chapter 16 of the NPC were in large transformed from the Rome Statute.³⁹⁴ The Rome Statute entered into force on 1 July 2002, and is the legal basis for the International Criminal Court (ICC).³⁹⁵ The object and purpose of the ICC is to help end impunity for the perpetrators of the most serious crimes of concern to the international community.³⁹⁶ The preparatory works of the NPC held that it would be easier to document that Norway had followed through with its international obligations in a loyal and adequate way by specifying these provisions in chapter 16 of the NPC.³⁹⁷ The intention of using specified provisions was to point to the fact that the provisions have to be interpreted in the light of, and in accordance with the international obligation.³⁹⁸ The preparatory committee held that this interpretation should not be exaggerated, and that national crim-

³⁹¹ LOV-2005-05-20-28

³⁹² Prop. 1 S (2012-2013), p. 112-113, Dokument 8:40 S (2012–2013)

³⁹³ See also Lov 7 March 2008 nr. 4

³⁹⁴ See Ot.prp.nr.8 (2007-2008) p. 32, 278 E-bok

³⁹⁵ About the Court (ICC)

³⁹⁶ About the Court (ICC)

³⁹⁷ See Ot.prp.nr.8 (2007-2008) p. 32 E-bok

³⁹⁸ See Ot.prp.nr.8 (2007-2008) p. 32 E-bok

inal-politics should be given consideration.³⁹⁹ The Rome Statute, which is also referred to as the International Criminal Code,⁴⁰⁰ is therefore intended to influence the interpretation of the specified provisions in chapter 16 of the NPC.⁴⁰¹

The preparatory works of chapter 16 of the NPC held that a central source to the principles and rules of international law cf. Article 21 litra b of the Rome Statute, would be decisions from International Courts in distinct cases, of which the ICTY was mentioned in particular.⁴⁰² Rape is penalised in Section 102 (g) and 103 (d) of the NPC, but not specifically defined. In its commentary to Section 102 (g) concerning rape, the preparatory works of the NPC held that the more narrow definition of rape stated by the ICTY in the *Furundžija case* would cover the *actus reus* of rape.⁴⁰³ This comment was also referred to in the preparatory works in regard to the definition of rape in Section 103 (d) war crimes.⁴⁰⁴ The *Furundžija definition* is very similar to that of the current definition of rape in Section 192 of the GCPC.

However, during the late 1990's and in the beginning of the 21st century, three definitions of rape were issued by the ICTY and the ICTR.⁴⁰⁵ These definitions were set out in the *Akayesu Judgment* of 2 September 1998, the *Furundžija case* from 10 December 1998, and the *Kunarac case* from 22 February 2001.⁴⁰⁶ There are currently cases pending before the International Criminal Court that is expected to bring clarity to how rape is defined in the

³⁹⁹ See Ot.prp.nr.8 (2007-2008) p. 32 E-bok

⁴⁰⁰ McGlynn (2010) p. 58

⁴⁰¹ See Ot.prp.nr.8 (2007-2008) p. 278 E-bok

⁴⁰² See Ot.prp.nr.8 (2007-2008) p. 278 E-bok

⁴⁰³ See Ot.prp.nr.8 (2007-2008) p. 284 E-bok

⁴⁰⁴ See Ot.prp.nr.8 (2007-2008) p. 286 E-bok

⁴⁰⁵ L.M. de Brouwer (2005) p. 105

⁴⁰⁶ L.M. de Brouwer (2005) p. 105, *Prosecutor v. Kunarac*

light of the Rome Statute.⁴⁰⁷ Judicial scholars have described the *Prosecutor v. Jean-Pierre Bemba Gombo* “to be a key ICC case concerning sexual crimes.”⁴⁰⁸ It is therefore likely to conclude that the definition of rape interpreted in the light of the Rome Statute is at the present unresolved.⁴⁰⁹

In order to clarify what the current definition of rape is in regard of crimes against humanity and war crimes, the Rome Statute, Elements of Crimes, and case law from the ICTY and ICTR and other relevant international law will be analysed. What is to be considered the definition of rape in Section 102 and 103 of the NPC will then be compared to the current definition of rape in Section 192 of the CGPC.

4.1.2 The definition of Rape in Section 102 g) and Section 103 d) of the NPC interpreted in the light of, and in accordance with the Rome Statute

4.1.2.1 Applicable law for the interpretation of the Rome Statute

In regard to applicable law for the interpretation of the Rome Statute, Article 21 read:

1. The Court shall apply:
 - a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

⁴⁰⁷ *Prosecutor v. Katanga and Ndjulu-chou, Prosecutor v. Jean-Pierre Bemba Gombo, Prosecutor v. Jean-Pierre Bemba Gombo*

⁴⁰⁸ McGlynn (2010) p. 58

⁴⁰⁹ The development of international law in the matter of criminal responsibility of individuals for war crimes and other serious offences is still under way. See Gaeta (2014) p. 765

c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.⁴¹⁰

The ICC stated in the *Prosecutor v. Jean-Pierre Bemba Gombo* that as set forth in article 21 (1) (b) of the Statute, "the Chamber refers to principles and rules of international law, including the established principles of international law of armed conflict. Reference is also made to applicable treaties as well as relevant jurisprudence of other tribunals which echo principles of the international law of armed conflict."⁴¹¹

The Statutes of the ICC, ICTY, and the International Criminal Tribunal for Rwanda (ICTR) are built upon the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 Article 3.⁴¹² These violations shall include, but shall not be limited to:

c) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;⁴¹³

⁴¹⁰ Rome Statute p. 16-17, *Prosecutor v. Jean-Pierre Bemba Gombo* (218)

⁴¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo* (218)

⁴¹² See amongst *Prosecutor v. Jean-Paul Akayesu* p.12-13 E-bok

⁴¹³ Cassese (2008) p. 16-17

Norway has ratified the Geneva-Conventions of 1949 nr.1, nr.2, nr.3⁴¹⁴, and nr.4⁴¹⁵. The Protocols additional to the Geneva Conventions of 12 of August 1949, relating to the protection of victims of international armed conflicts (Protocol I), and relating to the protection of victims of non- international armed conflicts (Protocol II), which entered into force in Norway on June 14 1982.⁴¹⁶ The Geneva Conventions are “essentially designed to regulate the treatment of persons who do not, or no longer, take part in armed conflict (civilians, the wounded, the sick and shipwrecked, as well as prisoners of war).”⁴¹⁷ The Rome Statute continues the statutes and treaties of which the ICTY and the ICTR are based upon. Norway is therefore obliged to consider the principles and interests these Conventions seek to protect of which the ICTY, ICTR and ICC has interpreted in order to define rape in Section 102 and Section 103 of the NPC.

4.1.2.2 Rape as a crime against humanity and war crime against a person in the Rome Statute Article 7 (1) (g) and Article 8 (2) (e) (vi) and the Elements of Crimes

Rape is listed in the NPC Section 102 g) as a crime against humanity cf. Article 7 (g) of the Rome Statute,⁴¹⁸ and in the NPC Section 103 d) as a war crime against a person cf. Article 8 (e) (vi) of the Rome Statute.⁴¹⁹ Rape is not explicitly defined in the NPC Section 102 g) and Section 103 d), nor in the Rome Statute, but defined in the Elements of Crimes.

Article 7 (1) (g) of the Rome Statute concerning rape as a crime against humanity read:

⁴¹⁴ Geneva-convention relative to the treatment of prisoners of war, with annexes, entered into force in Norway 03-02-1952

⁴¹⁵ Geneva-Convention relative to the protection of civilian persons in time of war, with annexes, entered into force 03-02-1952 in Norway, see also emeritus.lovdato.no/traktater/

⁴¹⁶ emeritus.lovdato.no/traktater/

⁴¹⁷ Cassese (2008) p. 82

⁴¹⁸ Rome Statute p. 4 E-bok, St.prp.nr. 24 (1999-2000) p. 29, 52-57 E-bok

⁴¹⁹ Rome Statute p. 8 E-bok, St.prp.nr. 24 (1999-2000) p. 29, 52-57 E-bok

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(g) Rape⁴²⁰

Article 8 (2) (e) (vi) of the Rome Statute in regard to rape as a crime of war read:

2. For the purpose of this Statute, 'war crimes' means:

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;⁴²¹

The *actus reus* of rape as a crime against humanity cf. article 7 (1) (g) -1 of the Rome Statute is defined in the Elements of Crimes:

- (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

⁴²⁰ Rome Statute Article 7 p. 3-4 E-bok

⁴²¹ Rome Statute Article 8 p. 5-9 E-bok

- (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
- (3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- (4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴²²

The Elements of Crimes clarify in footnote 16 to article 7 (1) (g) of the Statute that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age- related incapacity.⁴²³ Judicial Scholar Christine Byron comments that: “Once more this seems to be a compromise between different approaches taken by judgments of the ICTY and ICTR, with the ‘coercion’ approach of *Akayesu*, *Celebici* and *Furundžija* prevailing over the ‘consent’ approach of *Kunarac*.”⁴²⁴ Otto Triffterer in his commentary on the Rome Statute stated:

“Although the current jurisprudence in the two leading Appeals Chamber judgments, *Kunarac* in the ICTY and *Gacumbitsi* in the ICTR, have re-emphasized the fundamental nature of the crime as an attack on personal sexual autonomy, they have expressed this aspect of the crime by reintroducing the concept of non- consent. However, they have taken some steps to avoid the risk that this new formula-

⁴²² Elements of Crimes ICC Article 7 (1) (g) -1

⁴²³ Elements of Crimes ICC Article 7 (1) (g) -1 footnote 16

⁴²⁴ Byron (2009) p. 152

tion could place the Prosecutors under an unduly heavy burden and force the victim to demonstrate the lack of consent by stating that the circumstances in which crimes against humanity took place were almost always coercive. In any event, to the extent that there might be any weakening of protection in subsequent jurisprudence, the Elements of Crimes provide a better aid to the Court in interpreting article 7.”⁴²⁵

Consent is in the Rules of Procedure and Evidence to the Rome Statute of the ICC (RPE), Rule 70 described as:

“[I]n cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence”⁴²⁶

Rape as a crime of war has identical *actus reus* in article 8 (2) (e) (vi) of the Statute cf. the Elements of Crimes.⁴²⁷ The nexus to rape as a crime of war in article 8 (2) (e) (vi) is described in the Elements of Crimes as:

1. The conduct took place in the context of and was associated with an armed conflict not of an international character.

⁴²⁵ Triffterer (2008) p. 210- 211

⁴²⁶ Rules of Procedure and Evidence ICC Rule 70 p. 44

⁴²⁷ Elements of Crimes ICC Article 8 (2) (e) (vi) -1, *Prosecutor v. Jean-Pierre Bemba Gombo* p. 96-97 E-bok

2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁴²⁸

Both of these definitions of rape and explanations of genuine consent from the Elements of Crimes were repeated in the currently pending ICC-cases of the *Prosecutor vs. Katanga and Ndjulu-chou* (Katanga-case),⁴²⁹ and the *Prosecutor v. Jean- Pierre Bemba Gombo* (Bemba-case).⁴³⁰ Judicial scholars have described the *Bemba- case* “to be a key ICC case concerning sexual crimes.”⁴³¹ In light of the above, it is necessary to analyse relevant case-law from the ICTY and the ICTR in order to bring clarity as to what is to be considered the current definition of rape in the NPC Section 102 and 103.

4.1.2.3 Case- law from the ICTY and ICTR and their definition of rape

The legal framework of the ICC differs from that of the ad hoc tribunals, as it is put under regulation 55 of the Regulations, which state that the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation.⁴³² Nevertheless, in regard to crimes against humanity it has been held that case law from amongst ICTY and the ICTR has contributed to define the legal contours of the *actus reus* of crimes against humanity.⁴³³ “In the event, the various categories have been largely spelled out in the ICC Statute, Article 7 of which may be held to a large extent either to crystallize nascent notions or to codify the bulk of existing customary law.”⁴³⁴

⁴²⁸ Elements of Crimes ICC Article 8 (2) (e) (vi) -1

⁴²⁹ *Prosecutor v. Katanga and Ndjulu-chou*

⁴³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo, Prosecutor v. Jean- Pierre Bemba Gombo*

⁴³¹ McGlynn (2010) p. 58

⁴³² *Prosecutor v. Jean-Pierre Bemba Gombo* p. 71 E-bok

⁴³³ Cassese (2008) p. 109

⁴³⁴ Cassese (2008) p. 109

The ICC has used case law from the ICTY and the ICTR in order to determine the meaning of the constitute elements of rape in Article 7 (1) (g) and Article 8 (e) (vi). For example with regard to the term “coercion” the ICC Chamber in the *Katanga case* noted “the finding of the ICTR Trial Chamber in *The Prosecutor v. Akayesu* that a coercive environment does not require physical force.”⁴³⁵ What “genuine consent” cf. Rome Statute Article 7 (1) (g) (2) and Article 8 (e) (vi) entail, must therefore be sought brought into clarity through previous case-law from the ICTY, ICTR and other relevant international law cf. Rome Statute Article 21 (b).

In the *case of Kunarac, Kovac, and Vucovic (Kunarac case)* from 2001, the ICTY defined rape as a non-consensual act of sexual penetration.⁴³⁶ The three accused were charged with rape as a violation of the laws of customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute of the Tribunal, which explicitly refers to rape as a crime against humanity within the Tribunal’s jurisdiction cf. Article 5 (g).⁴³⁷ They were also prosecuted for rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 of the 1949 Geneva Conventions.⁴³⁸ In regard of the *actus reus* of rape, the ICTY stated that:

“Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”⁴³⁹

⁴³⁵ *Prosecutor v. Katanga and Ndjulu-chou* (437- 440)

⁴³⁶ *Prosecutor v. Kunarac* (438)

⁴³⁷ *Prosecutor v. Kunarac* p. 145 E-bok

⁴³⁸ *Prosecutor v. Kunarac* p. 145 E-bok

⁴³⁹ *Prosecutor v. Kunarac* (460)

Interestingly, the Trial Chamber in the *Furundžija case* from 10 December 1998 concluded that the *actus reus* of the crime of rape was:

- (i) the sexual penetration, however slight:
 - a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b. of the mouth of the victim by the penis of the perpetrator
- (ii) by coercion or force or threat of force against the victim or a third person⁴⁴⁰

At that time it was not possible to discern the elements of the crime of rape from the Statute of the Tribunal, international humanitarian law or human rights instruments,⁴⁴¹ from international treaty or customary law, the general principles of international criminal law and general principles of international law.⁴⁴² The accurate definition of rape was therefore reached through the criminal law principle of specificity, (“Bestimmtheitsgrundsatz”, also referred to by the maxim “nullem crimen sine lege stricta”).⁴⁴³ The Trial Chamber in the *Furundžija case* stated that it was necessary to look for principles of criminal law common to the major legal systems of the world in order to derive principles from national laws in order to define the specific elements of rape.⁴⁴⁴ The Trial Chamber in the *Kunarac case* from 22 February 2001 agreed that the elements concerning rape listed in the *Furundžija case* constitute the *actus reus* of the crime of rape in international law.⁴⁴⁵

“However, in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the *Furundžija* definition. (...) the *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by in-

⁴⁴⁰ *Prosecutor v. Furundžija* (185)

⁴⁴¹ *Prosecutor v. Kunarac* (437)

⁴⁴² *Prosecutor v. Furundžija* (185)

⁴⁴³ *Prosecutor v. Furundžija* (177)

⁴⁴⁴ *Prosecutor v. Furundžija* (177)

⁴⁴⁵ *Prosecutor v. Kunarac* (438)

ternational law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration *non-consensual* or *non-voluntary* on the part of the victim, which (...) is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition of international law.”⁴⁴⁶

In contrast to the Trial Chamber’s definition of rape in the *Furundžija case*, the Trial Chamber in the *Kunarac case* derived other “common denominators”.⁴⁴⁷ However, the Trial Chamber in the *Kunarac case* did not consider the national legal systems of the world

“in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles (...), “common denominators”, in those legal systems which embody the *principles* which must be adopted in the international context.”⁴⁴⁸

The Trial Chamber in the *Kunarac case* found that the national legal systems considered in the *Furundžija case* when “looked at as a whole, indicated that the basic underlying *principle* common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim.”⁴⁴⁹ The Trial Chamber agreed that the matters identified in the *Furundžija* definition – force, threat of force, or coercion, are “the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that the true common denominator which unifies the various systems

⁴⁴⁶ *Prosecutor v. Kunarac* (438)

⁴⁴⁷ *Prosecutor v. Furundžija* (178)

⁴⁴⁸ *Prosecutor v. Kunarac* (439)

⁴⁴⁹ *Prosecutor v. Kunarac* (440)

may be a wider or more basic principle of penalising violations of sexual autonomy.”⁴⁵⁰ The Trial Chamber quoted the *Furundžija judgment*:

“(…) all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without consent of the victim: force is given a broad interpretation and includes rendering the victim helpless.”⁴⁵¹

The Trial Chamber in the *Kunarac case* agreed that the definition of rape in the *Furundžija judgment* which focused on serious violations of sexual autonomy, was correct.⁴⁵² It stated that in general, the “domestic statutes and judicial decisions which define the crime of rape specify the nature of the sexual acts which potentially constitute rape, and the circumstances which will render those sexual acts criminal.”⁴⁵³ However, the relevant law in force in the different jurisdictions at the time of the proceedings of the *Kunarac case* (2001) identified a large range of different factors, which were classified as relevant sexual acts as the crime of rape.⁴⁵⁴ The Trial Chamber found these factors to fall within three broad categories:

- (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- (iii) the sexual activity occurs without the consent of the victim.⁴⁵⁵

⁴⁵⁰ *Prosecutor v. Kunarac* (440)

⁴⁵¹ *Prosecutor v. Furundžija* (80)

⁴⁵² *Prosecutor v. Kunarac* (442)

⁴⁵³ *Prosecutor v. Kunarac* (441)

⁴⁵⁴ *Prosecutor v. Kunarac* (442)

⁴⁵⁵ *Prosecutor v. Kunarac* (442)

The countries defining rape under category (i) by force or threat of force, were of the Trial Chamber deemed to be Bosnia and Herzegovina, Germany, Korea, China, Norway, Austria, Spain and Brazil, and some jurisdictions in the United States of America.⁴⁵⁶

Specific circumstances in regard of the vulnerability or deception of the victim were placed in category (ii). These specific circumstances provided that specified sexual acts will constitute rape including “that the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation.”⁴⁵⁷ Penal codes of a number of continental European jurisdictions contained provisions of this type, countries such as Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, and Estonia.⁴⁵⁸ Japan, Argentina, Costa Rica, Uruguay, the Philippines, and some of the States of the United States of America were also mentioned in this category.⁴⁵⁹

Section 192 litra b of the GCPC was formed to constitute as a second category of rape in the year of 2000, and is the equivalent of category (ii) in the *Kunarac case*.⁴⁶⁰

In regard of the third category where the sexual activity occurs without the consent of the victim, the Trial Court noted that in “most common law systems, it is the absence of victim’s free and genuine consent to sexual penetration which is the defining characteristic of rape.”⁴⁶¹ Commonwealth countries such as England, Canada, New Zealand, and Australia were found in this category.⁴⁶² India, Bangladesh, South Africa, and Zambia had also non-

⁴⁵⁶ *Prosecutor v. Kunarac* (443)

⁴⁵⁷ *Prosecutor v. Kunarac* (446,452)

⁴⁵⁸ *Prosecutor v. Kunarac* (447-448)

⁴⁵⁹ *Prosecutor v. Kunarac* (449-451)

⁴⁶⁰ See chapter 2.1.3 of this article.

⁴⁶¹ *Prosecutor v. Kunarac* (453)

⁴⁶² *Prosecutor v. Kunarac* (453)

consensual definitions of rape.⁴⁶³ Belgium, traditionally belonging to the European continental legal tradition also criminalized rape as “[A]ny act of sexual penetration, whatever its nature, and by whatever means, committed on someone who does not consent to it”.⁴⁶⁴

Seeking to find the basic underlying principle of the crime of rape in national jurisdictions through an examination of these three categories, the Trial Chamber found that:

“(…) The basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”⁴⁶⁵

In order to encompass all conduct of which negates consent as rape, the Trial Chamber concluded:

“In light of the above considerations, the Trial Chamber understands the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”⁴⁶⁶

⁴⁶³ *Prosecutor v. Kunarac* (454-455)

⁴⁶⁴ *Prosecutor v. Kunarac* (456)

⁴⁶⁵ *Prosecutor v. Kunarac* (457-460)

⁴⁶⁶ *Prosecutor v. Kunarac* (457-460)

The factual circumstances of the *Kunarac case* might explain why rape was defined as non-consensual by the ICTY. Dragoljub Kunarac was a military leader of approximately 15 soldiers of the Bosnian Serb Army.⁴⁶⁷ He initiated an attack on the Muslim population in the municipalities of Foča, Gacko and Kalinovik from July – August 1992.⁴⁶⁸ Several Muslim women were captured and raped multiple times by himself and his men. The women were so traumatized that the following incident occurred:

“The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking off the trousers of the accused and kissing him all over the body before having vaginal intercourse with him.”⁴⁶⁹

D.B. had been threatened with death by “Gaga” prior to the intercourse, if she did not satisfy the desires of his commander, Dragoljub Kunarac. She therefore initiated the sexual intercourse out of fear of being killed by “Gaga”.⁴⁷⁰ The Trial Chamber rejected Dragoljub Kunarac’s claim that he was not aware of the fact that D.B. only initiated the sexual intercourse with him out of fear for her life. The Trial Chamber found it highly improbable that Kunarac could realistically have been “confused” by the behaviour of D.B., given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foča region during that time.⁴⁷¹ The witness FWS-75 was gang-raped by 15 soldiers while Kunarac raped D.B. in the adjoining room.⁴⁷²

⁴⁶⁷ *Prosecutor v. Kunarac* (626)

⁴⁶⁸ *Prosecutor v. Kunarac* (577- 593)

⁴⁶⁹ *Prosecutor v. Kunarac* (644 – 646)

⁴⁷⁰ *Prosecutor v. Kunarac* (645)

⁴⁷¹ *Prosecutor v. Kunarac* (644–646)

⁴⁷² *Prosecutor v. Kunarac* (869)

In regard to whether or not Kunarac was aware of the threat by “Gaga” against D.B., the Trial Chamber found it irrelevant as to whether or not Kunarac heard “Gaga” repeat this threat against D.B. when he walked into the room. The Trial Chamber was satisfied that D.B. did not freely consent to any sexual intercourse with Kunarac as she was in captivity and in fear for her life after the threats uttered by “Gaga”.⁴⁷³ Kunarac was found guilty of rape and sentenced to 28 years of prison.⁴⁷⁴

In considering to which extent rape constitutes crime against humanity pursuant to Article 3 (g) of the Statute of the ICTR, the Appeals Chamber of the ICTR in the *Case of Akayesu* from 1998 noted that there was no commonly accepted international definition of rape.⁴⁷⁵ The ICTR considered the conceptual frameworks of rape similar to that of torture as “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”⁴⁷⁶ The ICTR defined “rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁴⁷⁷ Jean Paul Akayesu was found guilty of Crime against humanity in regard of rape.⁴⁷⁸ The coercive definition of rape is thus broader than the non-consensual approach.

However, the Appeals Chamber of the ICTR affirmed the lack of consent-based definition stated in the *Kunarac case*, in the *Prosecutor v. Gacumbitsi* in 2006.⁴⁷⁹ The Appeal Chamber went even further stating that lack of consent could also be proved through coercive circumstances as stated in the *Akayesu case*.⁴⁸⁰ The Prosecutor in the *Gacumbitsi case*

⁴⁷³ *Prosecutor v. Kunarac* (644-646)

⁴⁷⁴ *Prosecutor v. Kunarac* (685) (ii), (686 – 687), (871)

⁴⁷⁵ *Prosecutor v. Jean-Paul Akayesu* (596)

⁴⁷⁶ *Prosecutor v. Jean-Paul Akayesu* (596-598)

⁴⁷⁷ *Prosecutor v. Jean-Paul Akayesu* (596-598)

⁴⁷⁸ *Prosecutor v. Jean-Paul Akayesu* p. 179-180; 8 E-bok

⁴⁷⁹ *Prosecutor v. Gacumbitsi*, 7 July 2006

⁴⁸⁰ McGlynn (2010) p. 55

sought a clarification of the law relating to rape as a crime against humanity or as an act of genocide. The Prosecutor argued that non-consent of the victim and the perpetrator's knowledge thereof should not be considered elements of the offence that must be proved by the Prosecution, but subject to the limitations of Rule 96 of the Rules, where consent should be considered an affirmative defence.⁴⁸¹

The Trial Chamber had previously in the *Gacumbitsi case* found that the circumstances of were so coercive as to negate any possibility of consent. The Appeals Chamber agreed with the Prosecution that "the matter should be considered of "general significance" for the Tribunal's jurisprudence", referring amongst to the definition of rape in previous *Akayesu Appeal Judgment*.⁴⁸² Having cited the definition of rape from the *Kunarac case* paragraph 127 and paragraph 130, the Appeals Chamber stated that it "adopts and seeks to further elucidate the position expressed by the ICTY Appeals Chamber in the *Kunarac et al. Appeal Judgment*. Two distinct questions are posed. First, are non-consent and the knowledge thereof elements of the crime of rape, or is consent instead an affirmative defence? Second, if they are elements, how may they be proved?"⁴⁸³

"With respect to the first question, *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt. (...) As the Prosecution points out, Rule 96 of the Rules does refer to consent as a "defence". The Rules of Procedure and Evidence do not, however, redefine elements of the crimes over which the Tribunal has jurisdiction, which are defined by the Statute and by international law. (...) The Appeals Chamber agrees, moreover, with the analysis of the Trial Chamber in the *Kunarac case*:

⁴⁸¹ *Prosecutor v. Gacumbitsi* (147)

⁴⁸² *Prosecutor v. Gacumbitsi* (150) see also footnote 357 in the case

⁴⁸³ *Prosecutor v. Gacumbitsi* (152)

The reference in the Rule [96] to consent as a “defence” is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood (...) to be *absence of consent* which is an *element* of the crime.”⁴⁸⁴

The Appeal Chamber in the *Gacumbitsi Appeal Judgment* stated that “[r]ather than changing the definition of the crime by turning an element into a defence, Rule 96 of the Rules must be read simply to define the circumstances under which evidence of consent will be admissible.”⁴⁸⁵ The Appeal Chamber opened for a slight possibility that the accused “under certain circumstances” might raise reasonable doubt by introducing evidence that the victim specifically consented.⁴⁸⁶ Even if such evidence is admitted, “a Trial Chamber is free to disregard it if it concludes that under the circumstance the consent given was not genuinely voluntary. (...) Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.”⁴⁸⁷

Judicial scholars have favoured the coercive definition of rape in the *Akayesu Appeal Judgment* by the ICTR of 2 September 1998.⁴⁸⁸ An explanation to this might be that non-consent does not have to be proved by the Prosecutor, only “the context of the acts, in particular focusing on factors which establish the existence of coercive circumstances. This approach is especially warranted in relation to international crimes, which typically occur during armed conflict.”⁴⁸⁹ Judicial Scholar Antonio Cassese stated in his commentary to Article 7 of the ICC Statutes concerning the definition of rape as crimes against humanity,

⁴⁸⁴ *Prosecutor v. Gacumbitsi* (153- 54)

⁴⁸⁵ *Prosecutor v. Gacumbitsi* (154)

⁴⁸⁶ *Prosecutor v. Gacumbitsi* (156)

⁴⁸⁷ *Prosecutor v. Gacumbitsi* (156- 157)

⁴⁸⁸ McGlynn (2010) p. 54- 55

⁴⁸⁹ McGlynn (2010) p. 54

that the two definitions of rape set out in the *Furundžija judgment* and the *Kunarac case* “are in substance equivalent, for ‘coercion, or force, or threat of force’ in essence imply or mean ‘lack of consent’.”⁴⁹⁰

The coercive definition of rape is broader than the non-consensual approach taken in the *Kunarac case*, and the *Furundžija-definition* is narrower. However, in light of the above, it seems like the non-consensual definition of rape set out in the *Kunarac case* from 2001, confirmed in the *Gacumbitisi case* of 2006, has prevailed. In accordance with contemporary international criminal law, rape as crime against humanity and war crime has occurred when the sexual activity has not been genuinely consented to by the aggrieved party.

4.1.2.4 Other applicable treaties and principles of international law and their definition of rape

4.1.2.4.1 *The European Convention on Human Rights*

In the case of *M.C v. Bulgaria*, the ECtHR cited the non-consensual definition of rape stated by the ICTY in the *Kunarac case*. The ECtHR held that the true common denominator, which unifies the various systems of law, might be a wider or more basic principle of penalising violations of sexual autonomy than the one upheld in the *Furundžija judgment*.⁴⁹¹ Although the definition of rape in the *Kunarac case* “was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflect a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.”⁴⁹²

⁴⁹⁰ Cassese (2008) p. 110

⁴⁹¹ *Prosecutor v. Kunarac* (440), *M.C v. Bulgaria* (163)

⁴⁹² *M.C v. Bulgaria* (163)

4.1.2.4.2 *The Convention on the Elimination of All Forms of Discrimination against Women*

The Committee on the Elimination of Discrimination against Women stated in the *Vertido case* from 2009 that lack of consent is the constituent element of rape. The Committee noted that “*lack of consent is not an essential element* of the definition of rape in the Philippines Revised Penal Code. (...) The Committee has clarified time and again that rape constitutes a violation of women’s right to personal security and bodily integrity, and that its essential element was *lack of consent*.”⁴⁹³ (emphasis added)

CEDAW can be said to be close to a global Convention being signed by 187 countries.⁴⁹⁴ The Committee’s definition of rape confirms ECtHR’s conclusion that there is a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.

4.1.2.4.3 *The Council of Europe Convention on preventing and combating violence against women and domestic violence*

Article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, obligates the contracting parties to penalize non-consensual sexual acts. Article 36 defines consent as consent given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances. This regional treaty confirms the international trend towards regarding lack of consent as the essential element of rape and sexual abuse.

⁴⁹³ *Vertido v. the Philippines* p. 16 nr. 8.7. E-bok

⁴⁹⁴ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

4.1.3 Summary and Conclusion

There are currently cases pending before the International Criminal Court expected to bring clarity as to how rape is defined in the light of the Rome Statute.⁴⁹⁵ Judicial scholars have described the *Prosecutor v. Jean- Pierre Bemba Gombo* “to be a key ICC case concerning sexual crimes.”⁴⁹⁶ Case law from the ICTY and ICTR has brought about three definitions of rape. The ICTR defined rape in the *Case of Akayesu* from 1998 as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.⁴⁹⁷ The ICTY Trial Chamber defined rape in the *Furundžija judgment* from 1998 as “the sexual penetration by coercion or force or threat of force against the victim or a third person”. In the *Kunarac case* from 2001 rape was defined by the ICTY as “sexual penetration without the consent of the victim”. Lack of genuine consent as the constituent element of rape was followed up by the ICTR in the *Gacumbitsi Appeal Judgment* in 2006.⁴⁹⁸ In its commentary to Section 102 (g) concerning rape, the preparatory works of the NPC held that the more narrow definition of rape stated by the ICTY in the *Furundžija case* would cover the *actus reus* of rape.⁴⁹⁹ This comment was also referred to in the preparatory works in regard to the definition of rape in Section 103 (d) war crimes.⁵⁰⁰ It is possible that the definition of rape in the ICC Rome Statute Article 7 (g), and Article 8 (e) (vi), clarified in Elements of Crimes footnote 16 to article 7 (1) (g), was negotiated as to be a more narrow definition of rape than held in the *Kunarac case*.⁵⁰¹ However, the Rome Statute was adopted on a diplomatic conference in Rome on 17 July 1998, and entered into force on July 1 2002. The *Furundžija case* was made final on 10 December 1998. The *Kunarac case* was made final on

⁴⁹⁵ *Prosecutor v. Katanga and Ndjulu-chou, Prosecutor v. Jean-Pierre Bemba Gombo, Prosecutor v. Jean-Pierre Bemba Gombo*

⁴⁹⁶ McGlynn (2010) p. 58

⁴⁹⁷ *Prosecutor v. Jean-Paul Akayesu*

⁴⁹⁸ See Ot.prp.nr.8 (2007-2008) p. 278 E-bok

⁴⁹⁹ See Ot.prp.nr.8 (2007-2008) p. 284 E-bok

⁵⁰⁰ See Ot.prp.nr.8 (2007-2008) p. 286 E-bok

⁵⁰¹ See Ot.prp.nr.8 (2007-2008) p. 284 E-bok

22 February 2001.⁵⁰² Article 21 of the Rome Statute might indicate that the ICC Statutes are meant to be a dynamic Criminal Code, where crimes are defined or redefined by the ICC in the same dynamic approach taken by the ECtHR. It is therefore likely to conclude that the definition of rape in the light of the Rome Statute is at the present unresolved. The ICC *Bemba case* will most likely bring clarity as to how rape as a crime against humanity and a war crime is defined. However, at the present it seems like lack of consent is considered to be the constituent element of rape as a crime against humanity and war crime.

In the light of the above; “incapable of giving genuine consent” cf. rape as a crime against humanity cf. Article 7 (g) of the Rome Statute⁵⁰³, and as a war crime against a person cf. Article 8 (e) (vi) of the Rome Statute,⁵⁰⁴⁵⁰⁵ is to be understood as a non-consensual act of sexual penetration.⁵⁰⁶ “Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”⁵⁰⁷ The stance taken in the preparatory works of the NPC in favour of the more narrow definition of rape in the *Furundžija case* in regard to the definition of rape in Section 102 (g) and Section 103 (d) of the NPC can therefore not be upheld.⁵⁰⁸

⁵⁰² *Prosecutor v. Kunarac*

⁵⁰³ Rome Statute p. 4 see also St.prp.nr. 24 (1999-2000) p. 29,52-57

⁵⁰⁴ Rome Statute p. 8

⁵⁰⁵ LOV-2005-05-20-28 §§ 102-103

⁵⁰⁶ *Prosecutor v. Kunarac* (438)

⁵⁰⁷ *Prosecutor v. Kunarac* (460)

⁵⁰⁸ See Ot.prp.nr.8 (2007-2008) p. 284 E-bok

4.2 Conflicting provisions between the definition of rape in Section 102 and 103 of the NPC and the definition of rape in Section 192 of the GCPC

The *actus reus* of Section 192 litra a and Section 192 litra b of the GCPC can be read as to cover most of the *actus reus* of rape as clarified in the Elements of Crimes Article 7 (g), and Article 8 (e) (vi) to the Rome Statute. The current definition of rape in the GCPC holds any person liable for rape after Section 192 litra a if that person “engages in sexual activity by means of violence or threats”, or “engages in sexual activity with any person who is unconscious or incapable for any other reason of resisting the act” cf. Section 192 litra b.⁵⁰⁹

The preparatory works of chapter 16 of the NPC held in its commentary to § 102 (g) and § 103 (d) concerning rape, that the more narrow definition of rape stated by the ICTY in the *Furundžija case* would cover the *actus reus* of rape.⁵¹⁰

In accordance with the definition of rape held by the ICTY in the *Kunarac case*, Section 192 litra a and litra b seem to fall in under the scope of category (i) and category (ii):

- (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or⁵¹¹

The ICC Rome Statute concerning rape read together with Elements of Crimes footnote 16 to article 7 (1) (g), natural incapacity of giving “genuine consent,” interpreted in the light of the *Kunarac case*, expands the definition of rape to a third category:

⁵⁰⁹ GCPC 1902 p. 76, see also chapter 2 of this article

⁵¹⁰ See Ot.prp.nr.8 (2007-2008) p. 284 E-bok

⁵¹¹ *Prosecutor v. Kunarac* (442), GCPC 1902p. 76, see also chapter 2 of this article

“(iii) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”⁵¹²

This definition of rape differs significantly from Section 192 as it stands today.

Due to international obligations such as CEDAW and the Council of Europe Convention on preventing and combating violence against women and domestic violence, to define rape as “lack of consent”, the Norwegian Ministry of Justice and Public Security has proposed to expand the definition of rape in Section 192 to another *litra d*, criminalising non-consensual rape.⁵¹³ The draft of new legislation might indicate that the current definition of rape in the GCPC is not in compliance with the definition of rape held by the ICTY and thus international criminal law transformed into Section 102 (g) and Section 103 (d) of the NPC.

However, the nexus to rape as a crime against humanity or war crimes might constitute circumstances under which any non-consensual sexual activity could be subsumed under Section 192 of the GCPC as it stands today. Rape as a crime against humanity must be committed by a person as a part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack cf. Article 7 of the Rome Statute cf. Section 102 of the NPC. Rape as war crime is committed as a part of a plan or policy, or as part of a large-scale commission of such crimes against persons protected under the relevant Geneva Conventions of 12 August 1949⁵¹⁴ cf. Article 8 of the Rome Statute cf. Section 103 of the NPC. These nexus to rape can implicate the coercive circumstances that

⁵¹² *Prosecutor v. Kunarac* (457-460)

⁵¹³ Høringsnotat p. 33 E-bok

⁵¹⁴ Rome Statute Article 8 nr. 1, nr. 2.

underlies the provisions of Section 192 a of the GCPC. The Appeal Chamber stated in the *Kunarac case* “it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.”⁵¹⁵

Similar facts of the *Kunarac case*⁵¹⁶ occurred in the Norwegian Supreme Court verdict of Rt. 2006 page 1319.⁵¹⁷ The offender had taken advantage of two sex-trafficked girls of which the perpetrator knew had been subject to violence and threats, causing the women to be at his “disposal”.⁵¹⁸ Today this conduct would also have constituted a breach of Section 224 of the GCPC as human trafficking.⁵¹⁹ It is not clear from the Supreme Court verdict whether the accused had used violence or threats against the women in order to achieve the sexual activity. He was nonetheless aware that the two women were held in captivity and had been subject to violence and rapes, thus being too afraid to resist the intercourses.⁵²⁰ Weight was put to the fact that the perpetrator knew that the aggrieved parties were under coercion or threats cf. Section 192 litra a, and that the aggrieved party would not have consented to the sexual activity under normal circumstances.⁵²¹

Unlike D.B. in the *Kunarac case*, the women in Rt. 2006 page 1319 were victims of human trafficking. D.B. was a civilian being raped by military soldiers during a state of war. Human trafficking and crimes committed by soldiers against civilians in war- time may therefore fall under the same coercive circumstances which constitutes a violation of Section 192 litra a of the GCPC as it stands today. However, the Supreme Court did stretch the interpretation of the constituent elements of rape in Section 192 litra a in order to establish

⁵¹⁵ *Prosecutor v. Kunarac*, Appeal Chamber 12 June 2002 (130)

⁵¹⁶ *Prosecutor v. Kunarac* (644 – 646)

⁵¹⁷ See this article chapter 2.1.2.2.

⁵¹⁸ See also Andenæs (2008) p.142

⁵¹⁹ Rt. 2006 1319 (15)

⁵²⁰ Rt. 2006 1319 (11)

⁵²¹ Andenæs (2008) p. 142

criminal liability for the offender under a more "grave" penal provision. He himself had not used violence or threats in order to achieve the vaginal intercourses he had had with the women, being a prerequisite after Section 192 litra a. The defence appealed to the Supreme Court that his conduct amounted to a crime under Section 192 litra b, a "milder" definition of rape. Technically the accused did not engage in sexual activity "by means of violence or threats" cf. Section 192 litra a. The man knew that the women did not consent to the sexual activity, and that they were incapable of resisting the sexual activity being held captive. Such an interpretation of Section 192 litra a might constitute a breach with the principle of legality as it is currently practiced by the Supreme Court cf. Rt. 2011 page 469. The argumentation of the Supreme Court in Rt. 2006 page 1319 seems therefore stretched and constructed in order to establish criminal liability for the accused.

A lack of consent based definition of rape would have left no doubt that what the man in Rt. 2006 page 1319 did to those women was rape, and would have left no doubt as to whether criminal liability should be established under litra b rather than litra a cf. Section 192 of the GCPC. The *Kunarac case* serves here as an example. *Kunarac, Kovac, and Vucovic* appealed to the Appeals chamber claiming that rape could not be committed without the use of force or threat of force, and that the victim had to show "continuous" or "genuine" resistance throughout the sexual intercourse.⁵²² The Appeals Chamber agreed with the Trial Chamber's consent-based definition of rape. It rejected the Appellant's "resistance" requirement, an addition that had no basis in customary international law.⁵²³ The Appellants' assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted, was rejected by the Appeals Chamber as "bald," and that it was "wrong on the law and absurd on the facts."⁵²⁴ The Appeals Chamber noted that the Trial Chamber appeared to depart from the Tribunal's earlier jurisprudence in the *Furundžija judgment* paragraph 158. "However, in explaining its focus on the

⁵²² *Prosecutor v. Kunarac*, Appeal Chamber 12 June 2002 (126)

⁵²³ *Prosecutor v. Kunarac*, Appeal Chamber 12 June 2002 (128)

⁵²⁴ *Prosecutor v. Kunarac*, Appeal Chamber 12 June 2002 (128)

absence of consent as the *conditio sine qua non of rape*, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non- consent, but force is not an element *per se* of rape. In particular, the Trial Chamber wished to explain that there are

“factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstance without relying on physical force.”⁵²⁵

4.2.1 Summary and Conclusion

Non-consensual sexual activity has been defined as rape and thus a crime against humanity and war crimes, in order to avoid perpetrators evading liability for sexual activity the other party did not consent to. The nexus to rape as crime against humanity or war crimes might constitute circumstances under which any non-consensual sexual activity could be subsumed under Section 192 of the GCPC as it stands today. The Supreme Court of Norway in plenary session has stated that the term “crimes against humanity” differ greatly from that of ordinary penal provisions in the GCPC of 1902, constituting a more serious crime.⁵²⁶ This gives notion that the wording of the ‘ordinary’ statutory definition of rape in Section 192 should also penalise non-consensual rape, constituting an ‘ordinary crime’.⁵²⁷

⁵²⁵ *Prosecutor v. Kunarac* Appeal Chamber 12 June 2002 (129)

⁵²⁶ Rt. 2010 1445 (98-118)

⁵²⁷ See also Ot.prp.nr.8 (2007-2008) ch. 3.

4.3 The implications of not ensuring compliance between Section 192 of the GCPC and International Criminal law cf. Section 102 and 103 of the NPC

Section 3 of the NPC of 2005 and the GCPC of 1902 prescribes that if the criminal legislation has been amended in the period following the commission of an act, the penal provisions in force at the time of its commission shall be applicable to the act unless otherwise provided. The penal provisions in force at the time a particular issue is decided shall be applicable when they lead to a decision more favourable to the person the provisions in force at the time of commission of the act.⁵²⁸ This implies that if the definition of rape in Section 192 of the GCPC is more favourable than the definition of rape in Section 102 and Section 103 in chapter 16 of the NPC, the action would be subsumed under Section 192 and not qualify as “crimes against humanity” or “war crimes”. This could result into that the perpetrator would not be prosecuted for serious violations of international humanitarian law, as the crime of rape would be “ordinary,” and not evoke the maximum sentence of 30 years following breaches of chapter 16 of the NPC, and the social stigma that follows from being convicted according to such grave penal provisions. Failure to criminalise non-consensual rape in Section 192 could also result into that the alleged perpetrator escapes criminal liability in Norway.⁵²⁹

Article 97 of the Norwegian Constitution has been interpreted by the Supreme Court as to prohibit new legislation being used on actions only criminalized by international law at the time they were committed. The Supreme Court in a plenary session with dissent 11-6 concluded in Rt. 2010 page 1445 that the provisions in chapter 16 of the NPC of 2005 concerning crimes against humanity § 102 and war crimes § 103 could not apply to actions committed in Bosnia-Hercegovina in 1992. Chapter 16 of the NPC entered into force in 2008, and it would therefore constitute a breach with the prohibition of retroactive legislation in

⁵²⁸ GCPC 1902 Section 3, LOV-2005-05-20-28 § 3

⁵²⁹ See Ot.prp.nr.8 (2007-2008) p. 32 E-bok

Article 97 to penalize previous actions under graver penal provisions.⁵³⁰ “Law” in Article 96 of the Norwegian Constitution was also considered to prohibit Norwegian Courts from convicting people for crimes with immediate legal authority in international law.⁵³¹

The legal qualification matters in order for the ICC, ICTY or ICTR to accept that perpetrators of war crimes and crimes against humanity are brought to justice. For example, the ICTR has stated with referrals under the ICTR cf. Article 8 cf. Article 9, that it

”may still try a person who has been tried before a national court for ‘acts constituting serious violations of international humanitarian law’ if the acts for which he or she was tried were ‘categorized as an ordinary crime’. Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.”⁵³²

Failure to prosecute and convict individuals who have committed crimes against humanity and war crimes would therefore be contradictory to the object and purpose of chapter 16 of the NPC.⁵³³

4.4 Summary and Conclusion

Due to the gravity and circumstances of which rape as crimes against humanity and war crimes are performed, even non-consensual acts would be subsumed under Section 192 of the GCPC. There are therefore no conflicting provisions between the definition of rape in Section 102 and 103 of the NPC and Section 192 of the GCPC. However, a non-consensual definition of rape would eliminate doubt concerning whether a crime has been committed, and can avert that clearly reproachable incidents of non-consensual sexual activity goes

⁵³⁰ Rt. 2010 1445 (62- 127)

⁵³¹ Rt. 2010 1445

⁵³² Rt. 2010 1445 (111)

⁵³³ See Ot.prp.nr.8 (2007-2008) p. 32 E-bok

unpunished in the future due to the Supreme Court's strict practice of the principle of legality.

5 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

5.1 Introduction

The Council of Europe Convention on preventing and combating violence against women and domestic violence was opened for signature on May 11, 2011 in Istanbul, Turkey (Istanbul Convention). One of the primary considerations of the Istanbul Convention is to achieve greater equality between women and men.⁵³⁴ The Istanbul Convention provides a regional harmonization of the definition of rape in order to promote equality between women and men and end discrimination of women by holding perpetrators accountable according to the same standard and definition of rape.⁵³⁵ Norway signed the Istanbul Convention on July 7 2011.⁵³⁶

5.2 The definition of rape in Article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence

Article 36 of the Istanbul Convention concerning sexual violence, including rape read as follows:

- 1 “Parties shall take the necessary legislative or other measures to ensure that the following intentional conduct are criminalised:

⁵³⁴ http://www.coe.int/t/dghl/standardsetting/convention-violence/thematic_factsheets/Equality_EN.pdf

⁵³⁵ http://www.coe.int/t/dghl/standardsetting/convention-violence/thematic_factsheets/Equality_EN.pdf

⁵³⁶ <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG>

- a engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
 - b engaging in other non- consensual acts of sexual nature with a person;
 - c causing another person to engage in non-consensual acts of sexual nature with a third person.
- 2 Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
- 3 Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.”⁵³⁷

The Explanatory Report concerning Article 36 of the Istanbul Convention stated that this “article establishes the criminal offence of sexual violence, including rape. Paragraph 1 covers all forms of sexual acts which are performed on another person without her or his freely given consent and which are carried out intentionally.”⁵³⁸ The drafters sought to limit Article 36 litra a by requiring the penetration to be of a sexual nature, and thus avoid problems of interpretation.⁵³⁹ The Convention Parties were urged to take into account case law from the ECtHR in the assessment of the constituent elements of offences, of which the non- consensual definition of rape was mentioned in particular.⁵⁴⁰

In regard of the implementation of Article 36, “Parties of the Convention are required to provide for criminal legislation which encompasses the notion of lack of freely given consent to any of the sexual acts listed in lit.a to lit.c. It is, however, left to the Parties to decide

⁵³⁷ www.coe.int/t/dghl/standardsetting/convention-violence/about_en.asp

⁵³⁸ <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm> Article 36 (189)

⁵³⁹ <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm> Article 36 (190)

⁵⁴⁰ <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm> Article 36 (191)

on the specific wording of the legislation and the factors that they consider to preclude freely given consent. Paragraph 2 only specifies that consent must be given voluntarily as the result of the person's free will, as assessed in the context of the surrounding circumstances.”⁵⁴¹

In response to Article 36 of the Istanbul Convention and Norway's signature of it, the Ministry of Justice and Public Security commenced an official hearing regarding the expansion of Section 192 to an additional *litra d*, penalising non-consensual sexual activity, which closed on 1 June 2013.⁵⁴² Norway's signature of the Istanbul Convention has therefore already had a political impact towards criminalizing non-consensual sexual activity.

5.3 The affect the definition of rape in Article 36 of the Istanbul Convention have on the definition of rape in Section 192 of the GCPC when it is not incorporated or transformed into domestic Norwegian Law

The Supreme Court of Norway stated in Rt. 2001 page 1006 that Conventions Norway has ratified but not incorporated as domestic law, can affect domestic law through the “presumption principle.” The presumption principle is a principle developed by the Supreme Court of Norway and Judicial Scholars, which hold that domestic law is assumed in compliance with Norway's international obligations.⁵⁴³ The Court held in Rt. 2001 page 1006 that by the internal use of Conventions that are ratified, but not transformed into national statutory law, one have to decide whether the provision in question is meant to give individual rights, or if it expresses a legislative intent, or if it orders the member states to achieve a certain goal or minimum standard. The direct use of ratified Conventions, prerequisite that the provision is composed in such a way that it is useful for immediate use by

⁵⁴¹ Istanbul Convention Article 36 (193)

⁵⁴² Høringsnotat p. 33

⁵⁴³ Cf. Rt. 2001 1006, Rt. 1997 580, and Rt. 2000 1811

the national authorities. Further, the provisions of the Convention must concretize to specific rights and obligations.⁵⁴⁴

As of today, the Convention itself will not provide any citizens of Norway direct legal rights, as it is not ratified, nor implemented as statutory law cf. Article 76-78 and Article 26 (2) of the Constitution of Norway. The strict interpretation of “law” in Article 96 and thus practice of the principle of legality by the Supreme Court of Norway cf. Rt. 2009 page 780, Rt. 2011 page 469 and Rt. 2010 page 1445 precludes criminal liability from being established based on the Convention. Harmonisation in the realm of criminal law is thus precluded. This can be seen as a favourable practice towards the accused in the light of the principle of “Nullum crimen, nulla poena sine lege”.⁵⁴⁵

However, the Istanbul Convention of 2011 has already contributed to the process of revising Section 192 of the GCPC as to criminalize non-consensual rape. The Ministry of Justice and Public Security referred to the Istanbul Convention as a part of the reason for suggesting in 2013 that Section 192 should be given an additional *litra d* in order to penalise non-consensual rape.⁵⁴⁶

The Norwegian Supreme Court referred to the Istanbul Convention as a source of law of weight in Rt. 2013 page 588. Failure to follow the provisions set out in Article 36 might therefore in time constitute liability for the State of Norway towards its citizens for lack of legal protection against a third-party’s non-consensual sexual violation.

Finally, the Istanbul Convention can be taken into account towards regarding lack of consent as the prevailing constituent element of rape in Europe.

⁵⁴⁴ Cf. Rt. 2001 1006 cf. Ot.prp.nr.3 (1998-1999) p. 11, 23-24 cf. NOU 1993:18 p. 10-106

⁵⁴⁵ In this direction Rt. 2010 1445

⁵⁴⁶ Høringsnotat p. 22-34, 31-35 E-bok

5.4 Summary and Conclusion

The Council of Europe Convention on preventing and combating violence against women and domestic violence Article 36 poses an obligation on the contracting parties to penalize non-consensual sexual activity as rape. The Convention is signed by Norway, but not ratified. This limits the Convention's immediate impact on domestic criminal law and the definition of rape. However, the Ministry of Justice and Public Security has already referred to the Istanbul Convention as a part of the reason for suggesting in that Section 192 should be given an additional *litra d* in order to penalise non-consensual rape.⁵⁴⁷ The Supreme Court of Norway also referred to the Convention in Rt. 2013 page 588, which indicates that the object and purpose of the treaty is already recognised by leading legal institutions in Norway.

⁵⁴⁷ Høringsnotat p. 22-34, 31-35 E-bok

6 Final Summary and Conclusion

The incorporation of the European Convention on Human Rights (ECHR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) into the Human Rights Act, and transformation of the Rome Statute into the Norwegian Penal Code of 2005(NPC) has actualized the impact of international tendencies in regard of positive obligations under the Conventions to penalise any non-consensual activity as rape. Failure to comply with these international obligations provides different outcomes for the Member State Parties. At the present, the current definition of rape in Section 192 of the General Civil Penal Code of 1902 (GCPC) is in conflict with the international obligations of Norway, as it does not penalise non-consensual sexual activity as rape. The ECtHR stated in *M.C v. Bulgaria* that the Member State Parties have a positive obligation to penalise any non-consensual sexual act cf. Articles 3 and 8 of the ECHR. Failure to comply with this obligation may give rise to damage liability for the State of Norway towards individuals subject to non-consensual sexual activity. The Committee of CEDAW urged Norway in its Eight Periodic Report of Norway to: “Adopt a legal definition of rape in the Penal Code so as to place the lack of consent at its centre, in line with the Committee’s general recommendation No. 19, and the Vertido case.” In the light of relevant domestic statutory law and case law, this recommendation can be interpreted as a specific provision under CEDAW and thus a positive obligation for Norway to undertake. Failure to comply with this obligation might contribute to continued discrimination of women in law and practice. The Rome Statute was transformed into the Norwegian Penal Code (NPC) of 2005 chapter 16 penalising rape as war crimes and crimes against humanity. Rape is not specifically defined, but the preparatory works held that the specified provisions were to be interpreted in the light of, and in accordance with the international obligation. The definition of rape as a war crime and as a crime against humanity is at the present unresolved. There are currently pending cases before the International Criminal Court expected to bring clarity as to how rape is defined in the light of the Rome Statute. During the late 1990’s and beginning of the 21st century, three definitions of rape were issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Current trends of international law seem to favour the non-consensual definition of rape

held by the ICTY in the *Kunarac case*. The object and purpose of transforming the Rome Statute into chapter 16 of the NPC was to prosecute war crimes and crimes against humanity under Norwegian jurisdiction. Failure to revise or expand the definition of rape in the GCPC might prevent Norwegian Courts from convicting people accused of crimes against humanity and war crimes, contrary to the object and purpose of chapter 16 of the NPC. The situation with two different definitions of rape in Norwegian Criminal Statutes may be considered unsatisfactory. Even if there were no conceptual or systemic arguments decisively against maintaining this dual system, the International criminal solution may provide additional policy arguments in favour of redefining rape in the domestic Penal Code. The Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) confirms the international trend towards regarding lack of consent as the constituent element of rape. Case law, and reports from the ECtHR, Committee of CEDAW, ICTY, ICTR and ICC shows that these supranational organs refer to one another in deciding the common denominator of rape. The Constitution of Norway and the Supreme Court's strict practice of the principle of legality limit the scope of the immediate affect of International Obligations in the realm of criminal law, in favour of the accused. Fulfilment of the International Obligations of Norway to penalise non-consensual sexual activity as rape is thus based on the consensus of the State.

Table of reference

Books, articles and more

- Andenæs, Johannes *The General Part of the Criminal Law of Norway*, New York University, New York 1965
- Andenæs, Johannes, 5th edition by Matningsdal, Magnus and Rieber- Mohn, Georg Fredrik *Alminnelig Strafferett*, Universitetsforlaget, 2004.
- Andenæs, Johannes by Andorsen, Kjell V. *Spesiell strafferett og formuesforbrytelsene*, Universitetsforlaget, 2008.
- Andenæs, Johannes, by Fliflet Arne *Statsforfatningen i Norge*, 10th Edition, Universitetsforlaget, 2006.
- Byron, Christine *War crimes and crimes against humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, 2009.
- Cassese, Antonio *International Criminal Law*, 2nd Edition, Oxford University Press, 2008.
- Gaeta, Paola, Edited by Clapham, Andrew and Gaeta, Paola *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, First Edition, 2014.
- Eide, Asbjørn, Krause, Catarina, and Rosas, Allan *Economic, Social and Cultural Rights*, 2nd Edition, Kluwer Law International, 2001.
- Eng, Svein *Rettsfilosofi*, Universitetsforlaget, Oslo 2007.
- Eckhoff, Torstein, 5th edition by Jan E. Helgesen *Rettskildelære*, Universitetsforlaget, Oslo 2011.
- Harris, O'Boyle, Warbrick, First Edition *Law of the European Convention on Human*

- Hellum, Sinding Aasen *Rights*, Butterworths, 1995.
- L.M. de Brouwer, Anne Marie *Women's Human Rights CEDAW in International, Regional and National Law*, Cambridge University Press, New York 2013.
- Macdonald, Matscher, Petzold, by F. *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005.
- Matscher *The European System for the Protection of Human Rights*, Kluwer Law International 1993.
- Mathiesen, Thomas *Retten i samfunnet En innføring i rettssosiologi*, Pax Forlag A/S, Oslo 2011.
- Merry, Sally Engle, Edited by Agosin, Marjoire *Women, Violence and the Human Rights System. I: (Red) Agosin, Marjoire Women, Gender and Human Rights 2001 p. 83-97.*
- McGlynn, Clare and Munro, Vanessa E., *Rethinking Rape Law*, Routledge-Cavendish, 2010.
- Edited by *Innføring i folkerett*, 3 Edition, Universitetsforlaget, Oslo, 2006.
- Ruud, Morten and Ulfstein, Geir *Economic and Social Rights as Legal Rights in: Economic, Social and Cultural Rights*, 2nd Edition, Kluwer Law International, 2001.
- Scheinin, Martin *Textbook on International Human Rights*, 5th edition, Oxford University Press, 2012.
- Smith, Rhona K.M. *Commentary on the Rome Statute of the International Criminal Court*,
- Triffterer, Otto, Edited by

Articles

- Andenæs, *Norske domstoler og utviklingen av menneskerettene*
Mads, Eirik Jussens Venner 05/2011 (Side 251-286)
Bjørge ISSN Online: 1504-3126.
- Andenæs, (2011). INTERNATIONAL COURT OF JUSTICE, CASE CONCERN-
Mads ING AHMADOU SADIO DIALLO (REPUBLIC OF GUINEA V
DEMOCRATIC REPUBLIC OF THE CONGO) JUDGEMENT OF 30
NOVEMBER 2010. *International and Comparative Law Quarterly*.
ISSN 0020-5893. 60(3), s 810- 819. doi: [10.1017/S0020589311000352](https://doi.org/10.1017/S0020589311000352)
page 814.
- Andenæs, (2013). II. INTERNATIONAL COURT OF JUSTICE: QUESTIONS
Mads & RELATING TO THE OBLIGATION TO EXTRADITE OR PROSE-
Weatherall, CUTE (BELGIUM v SENEGAL) JUDGMENT OF 20 JULY 2012. *In-*
Thomas *ternational and Comparative Law Quarterly*. ISSN 0020-
5893. 63(3), s 753- 769. doi: [10.1017/S0020589313000250](https://doi.org/10.1017/S0020589313000250) page 760.
- Graver, Hans ”Hvem bestemmer over loven? Hvordan rettsliggjøring av samfunnet
Petter gjør jussen mektigere på bekostning av politikken.”
I Samtiden nr. 2, 2012 s. 100- 110.
- Mathiesen, *Ytring – Internasjonaliseringen av norsk strafferett*
Gjermund Tidsskrift for Strafferett 2006 s. 3 – (TFST-2006-3).
- Nollkaemper, *Conversations Among Courts: Domestic and International Adjudicators*
André by André Nollkaemper, Amsterdam Center for International Law, ACIL
Research Paper 2013-08 page 8.

Sand, Inger-Johanne: *Hva er rettens rolle i dag?* I: Institutt for kriminologi og rettssosiologi, Stensilserien nr. 101. (2005) s. 15-39.

Ulfstein, Geir *Den rettslige betydningen av avgjørelser fra menneskerettslige konvensjonsorganer* by Geir Ulfstein, Lov og Rett 09/2012
(side 552-570) ISSN Online: 1504-3061.

Domestic statutory laws

- | | |
|------|--|
| 1814 | Kongeriket Norges Grunnlov (Grunnloven) av 17. mai 1814 |
| 1902 | Almindelig borgerlig straffelov (straffeloven) av 22. mai 1902 nr 10.
(Strl. 1902 § 192) |
| 1955 | Lov av 3 juni 1955 nr. 2 § 390 a, LOV-1902-05-22-10 |
| 1978 | Lov av 9 juni 1978 nr. 45 om likestilling mellom kjønnene. |
| 1981 | Lov om rettergangsmåten i straffesaker (Straffeprosessloven) av
22. Mai 1981 nr. 25, LOV-1981-05-22-25 |
| 1999 | Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) av 21 Mai 1999 nr. 30, LOV-1999-05-21-30 |
| 2000 | L11.08.2000 nr. 76 i kraft straks. § 192 |
| 2001 | Lov om erstatning fra staten for personskade voldt ved straffbar handling m.m. (voldsoffererstatningsloven) av 20 april 2001 nr. 13 |
| 2003 | Ikrafttr. av lov 2003:86 (innarb. barnekonvensjon)
FOR-2003-08-01-991: Ikrafttredelse av lov av 1. August 2003 nr. 86 om endringer i menneskerettsloven mv. (innarbeiding av barnekonvensjonen i norsk lov). |
| 2005 | Lov om straff (straffeloven) LOV-2005-05-20-28 |
| 2005 | Lov 10 Juni 2005 nr. 38 FOR-2005-06-10-527: Ikrafttredelse av lov 10. Juni 2005 nr. 38 om endringer i likestillingsloven mv. (Gjennomføring av Europaparlaments- og rådsdirektiv 2002/73/EF og innarbeiding av FN-konvensjonen om avskaffelse av alle former for diskriminering av kvinner med tilleggsprotokoll i norsk lov). |
| 2008 | Lov 7 Mars 2008 nr. 4, LOV-2005-05-20-28 |

- 2009 Kgl.res. 19 Juni 2009 nr. 696, FOR-2009-06-19-696: Ikraftsetting av lov 19. Juni 2009 nr. 80 om endringer i kvinnekrimineringskonvensjonen)
- 1978 Forskrift om narkotika (narkotikalistene) FOR-1978-06-30-8
(The General Civil Penal Code § 162 cf. Act 1992-12-04-132. Act relating to medicinal products (Medicinal Products Act) Section 22 cf. Statutory provision for drugs of 30 June 1978 nr. 8 Section 2 and 3.)

Unofficial English translations of statutory laws

- GCPC The General Civil Penal Code of Act of 22 May 1902 No. 10
<http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>
- CN 1814 The Constitution of Norway 17 May 1814
<https://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>
- HRA 1999 The Human Rights Act of 21 May 1999
<http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf>

Domestic preparatory works

- NOU 1993:18 NOU 1993:18 Lovgivning om menneskerettigheter
- NOU 2006:10 NOU 2006:10 Fornærmede i straffeprosessen –
nytt perspektiv og nye rettigheter
- NOU 2008:4 NOU 2008:4 Fra ord til handling
Bekjempelse av voldtekt krever handling
- Ot.prp.nr. 3 (1998-1999) Ot.prp.nr. 3 (1998-1999)
Om lov om styrking av menneskerettighetenes stilling i
norsk rett (menneskerettsloven)
- Ot.prp.nr.28 (1999-2000) Ot.prp.nr.28 (1999-2000)
Om lov om endringer i straffeloven mv. (seksuallovbrudd)
- Ot.prp.nr.8. (2007-2008) Ot.prp.nr.8. (2007-2008)
Om lov om endringer i straffeloven 20. Mai 2005 nr. 28
mv. (skjerpede og formildende omstendigheter, folke-

	mord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet)
Ot.prp.nr. 93 (2008-2009)	Ot.prp.nr. 93 (2008-2009) Om lov om endringer i menneskerettsloven mv. (inkorporering av kvinnekrimineringskonvensjonen)
Innst.O. nr. 51 (1998-1999)	Innst.O. nr. 51 (1998-1999) Innstilling frå justiskomiteen om lov om styrking av menneskerettane si stilling i norsk rett (menneskerettsloven).
Innst.O.nr.115 (2008-2009)	Innst.O.nr.115 (2008-2009) Innstilling frå justiskomiteen om lov om endringer i menneskerettsloven mv. (inkorporering av kvinnekrimineringskonvensjonen)
St.prp.nr.72 (1980-81)	St.prp.nr.72 (1980-81) Om samtykke til ratifikasjon av kvinnekrimineringskonvensjonen
St.prp.nr. 24 (1999-2000)	St.prp.nr. 24 (1999-2000) Om samtykke til ratifikasjon av vedtektene av 17. Juli 1998 for Den internasjonale straffedomstol ("Roma-vedtektene")
Innst. S. Nr. 196 (1980-1981)	Innst. S. Nr. 196 (1980-1981)
Prop. 1 S (2012-2013)	Prop. 1 S (2012-2013) Tillegg 1 (2012-2013) Endring av Prop. 1 S (2012-2013) om statsbudsjettet 2013 under Justis- og beredskapsdepartementet, Helse- og omsorgsdepartementet, Arbeidsdepartementet og Fornyings-, administrasjons- og kirkedepartementet
Dokument 8:40 S (2012–2013)	Dokument 8:40 S (2012–2013) Representantforslag fra stortingsrepresentantene André Oktay Dahl, Anders B. Werp og Erna Solberg om IKT i politiet, ikrafttredelse av ny straffelov mv.

Høringsnotat Høringsnotat om endringer i straffeloven 1902 og straffeloven 2005 (personforfølgelse, voldtekt og andre seksuelle overgrep, formidling av prostitusjon, forberedelse til tvangsekteskap, foreldelsesregler mv.) Lovavdelingen Februar 2013 Snr. 20123307
<http://www.regjeringen.no/pages/38226240/Hoeringsnotat.pdf>

Reports

Rec(2002)5 Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence paragraph 35 of the appendix

Conventions, resolutions and more

Geneva Conventions The Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 Article 3.

ECHR Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950

Vienna Convention Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969

CEDAW Convention on the Elimination of Discrimination of All Women. Adopted in 1979 by the UN General Assembly

Rome Statute Rome Statute of the International Criminal Court, Rome, 1 July 2002 http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

Istanbul Convention Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), 12 April 2011 Istanbul
<http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%20210%20English.pdf>

<http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm>

Elements of Crimes Elements of Crimes International Criminal Court

ICC ICC-PIDS-LT-03-002/11_Eng (2011)

ISBN No. 92-9227-232-2

<http://www.icc->

[cpi.int/iccdocs/PIDS/publications/ElementsOfCrimesEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/ElementsOfCrimesEng.pdf)

Rules of Procedure Rules of Procedure and Evidence,

and Evidence ICC Assembly of States Parties to the Rome Statute of the ICC, Official Records, First Session, ICC-ASP/1/3, 3-10 September 2002

UN Documents

General General recommendations made by the Committee on the Elimina-
Recommendation tion of Discrimination against Women No. 19 (11th session, 1992)
No. 19 Violence against women

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

CEDAW/C/NOR/8 CEDAW/C/NOR/8, Concluding observations on the Elimination of
Discrimination of Women Norway 9 March 2012
www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-NOR-CO-8.pdf

Foreign statutory laws

Straffeloven Straffeloven nr. 126 af 15 april 1930 (Denmark) med senere
ændringer.

Straffeloven er senest bekendtgjort ved IbK. 909, 2005

Brottsbalken Brottsbalk (1962:700) 1962-12-21 (Sweden)

<https://lagen.nu/1962:700#A2> in English:

<http://www.government.se/content/1/c6/02/77/77/cb79a8a3.pdf>

Canadian Criminal Code Canadian Criminal Code, Crimes Act 1958 (Vic)

Swedish preparatory works

SOU 2010:71

Sexualbrottslagstiftningen – utvärdering och reformförslag,
Stockholm 2010

<http://www.regeringen.se/content/1/c6/15/45/15/e59efb2d.pdf>

Domestic court decisions

Rt. 1946 198

Rt.1961 547

Rt. 1966 916

Rt. 1973 433

Rt. 1982 578

Rt. 1983 1345

Rt. 1986 252

Rt.1989 979

Rt. 1989 1309

Rt. 1993 963

Rt. 1995 1734

Rt. 1997 580

Rt. 2000 996

Rt. 2000 1811

Rt. 2001 1006

Rt. 2002 557

Rt. 2003 359

Rt. 2003 495

Rt. 2003 687

Rt. 2004 39

Rt. 2004 1902

Rt. 2006 262

Rt. 2006 1319
Rt. 2008 1409
Rt. 2008 1764

Rt. 2009 780
Rt. 2010 1445
Rt. 2011 469
Rt. 2011 800
Rt. 2013 588

International court decisions

Internet source	European Court of Human Rights
1968	<i>Case of Wemhoff v. Germany</i> , Strasbourg, 27 June 1968 Application no. 2122/64
1978	<i>Case of Tyrer v. The United Kingdom</i> , Strasbourg, 25 April 1978 Application no. 5856/72
1985	<i>Court Chamber Case of X and Y v. the Netherlands</i> , Strasbourg, 26 March 1985 Application no. 8978/80
1997	<i>Case of Aydin v. Turkey</i> , Strasbourg, 25 September 1997, Application no. 23178/94
2000	<i>Case of Labita v. Italy</i> , Strasbourg, 6 April 2000, Application no. 26772/95
2001	<i>Case of Dougoz v. Greece</i> , Strasbourg, 6 March 2001, Application no. 40907/98
2001	<i>Case of Peers v. Greece</i> , Strasbourg, 19 April 2001, Application no. 28524/95
2001	<i>Case of Z and Others v. the United Kingdom</i> , Strasbourg 10 May 2001, Application no. 29392/95
2001	<i>Case of Al-Adsani v. The United Kingdom</i> , Strasbourg, 21 November 2001 Application no. 35763/97

2002	<i>Christine Goodwin v the United Kingdom</i> , Strasbourg, 11 July 2002, Application no. 28957/95
2002	<i>Case of E. and Others v. the United Kingdom</i> , Strasbourg, 26 November 2002 Application no. 33218/96
2003	<i>Case of M.C. v. Bulgaria</i> , Strasbourg, 4 December 2003 Application no. 39272/98
2012	<i>Case of C.A.S. and C.S. v. Romania</i> , Strasbourg, 20 March 2012, Application no. 26692/05
2012	<i>Case of I.G. v. Moldova</i> , Strasbourg, 15 May 2012, Application no. 53519/07
2013	<i>Case of Rholena v. The Czech Republic</i> , Strasbourg, 18 April 2013, Application No. 59552/08.
2013	<i>Case of Eremia v. The Republic of Moldova</i> , Strasbourg, 28 May 2013, Application no. 3564/11
2013	<i>Case of Söderman v. Sweden</i> , Strasbourg, 12 November 2013, Application no. 5786/08
Paper source	European Court of Human Rights
1978	<i>Ireland v. The United Kingdom</i> , Strasbourg, 18 January 1978, Series A no. 25, page 65, § 162
1997	<i>Raninen v. Finland</i> 16 December 1997, Reports of Judgments and Deci- sions, 1997- VIII, pp. 2821-22, § 55
1998	<i>A v. the United Kingdom</i> , judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22

Internet source	International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC)
<i>Prosecutor v. Jean-Paul Akayesu</i>	<i>Prosecutor v. Jean-Paul Akayesu</i> ICTR-96-4-T, Trial Chamber, 2 September 1998
<i>Prosecutor v. Furundžija</i>	<i>Prosecutor v. Furundžija</i> Case IT-95-17/1-T Judgment, 10 December 1998
<i>Prosecutor v. Kunarac</i>	<i>Prosecutor v. Kunarac</i> Case No.: IT-96-23-T& IT-96-23/1-T, Trial Judgment of 22 February 2001, IT-96-23&IT-96-23/1-A, Appeals Judgment of 12 June 2002 http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf http://www.icty.org/case/kunarac/4
<i>Prosecutor v. Gacumbitsi</i>	<i>Case of Gacumbitsi</i> , ICTR-2001-64, Appeals Chamber 7 July 2006
<i>Prosecutor v. Katanga and Ndjulu-chou</i>	<i>Case of Prosecutor v. Katanga and Ndjulu-chou</i> No. ICC-01/04-01/07, Sentenced 23 May 2014
<i>Prosecutor v. Jean-Pierre Bemba Gombo</i>	<i>Case of the Prosecutor v. Jean-Pierre Bemba Gombo</i> No. ICC-01/05-01/08

Court decisions from
England and Wales

Julian Assange v. The Swedish Prosecution Authority Case No: CO/1925/2011, 2 November 2011
Authority http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_11_11_assange.pdf

International decisions: Committee on the Elimination of Discrimination against Women

Vertido v. the Philippines Communication No. 18/2008
Vertido v. the Philippines
CEDAW/C/46/D/18/2008
http://www.coe.int/t/dghl/standardsetting/convention-vio-lence/caselaw/CEDAW%20C%2046%20DR%2018%202008_en%20Vertido%20v%20%20Philippines.pdf

SVP v. Bulgaria Communication No. 31/2011,
SVP v. Bulgaria, CEDAW/C/53/D/31/2011

Press release/ News

14.03.2006: Oppfordring om å melde fra om krav mot staten som følge av manglende gjennom-føring av motorvognforsikringsdirektiver I norsk rett
<http://www.regjeringen.no/nb/dokumentarkiv/stoltenberg-ii/jd/Nyheter-og-pressemeldinger/nyheter/2006/krav-mot-staten-finnanger-ii.html?id=100272>
<http://www.nrk.no/norge/mener-det-er-enda-flere-voldtekter-1.11576788>
<http://www.dagbladet.no/2014/02/28/kultur/meninger/kronikk/voldtekt/vold/32079782/>

Reports

Rapport nr. 1/2007

Riksadvokatens undersøkelsesgrupper
- rapport nr. 1/2007

En undersøkelse av kvaliteten på påtalevedtak i voldtektssaker som har endt med frifinnelse m.v. Avgitt 15.03.2007

<http://www.riksadvokaten.no/filestore/Dokumenter/Publikasjoner/Publikasjon1-20072.pdf>

Thoresen, Siri and Hjemdal, Ole (red.)

”Vold og Voldtekt i Norge” En nasjonal forekomststudie av vold i et livsløpsperspektiv, 25 February 2014, Rapport 1/2014,
http://www.nkvts.no/biblioteket/Publikasjoner/Vold_og_voldtekt_i_Norge.pdf

About the Court (ICC)

http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx

About the Istanbul Convention

http://www.coe.int/t/dghl/standardsetting/convention-violence/thematic_factsheets/Equality_EN.pdf

Norwegian Ministry of Foreign Affairs Treaty Index:

<http://emeritus.lovdata.no/traktater/>